Supreme Court U.S.
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No. _____

In the Supreme Court of the United States

BRITTAN COMMUNICATIONS INTERNATIONAL CORPORATION,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The court below affirmed the district court's ruling that Brittan's 202(a) claim for discrimination in billing and collections services did not fall within the scope of Title II of the Communications Act.

(1) Since the FCC classifies billing and collections services as "communication services," does Section 202(a) of the Communications Act provide a cause of action for discrimination in billing and collections services provided by a common carrier?

LIST OF PARTIES

The Petitioner/Plaintiff is Brittan Communications International Corporation. There is not a parent or publicly held company owning 10% or more of the Petitioner's stock.

The Respondent/Defendant is Southwestern Bell Telephone Company, which is now SBC.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 313 F.3d 899. (App. A). The opinion of the district court and its relevant order is reported at 177 F.Supp.2d 580. (App. B)

JURISDICTION

The court of appeals entered its judgment on December 16, 2002. (App. A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case include 47 U.S.C. § 153, 47 U.S.C. § 202(a), and 47 U.S.C. § 251. These provisions are set out verbatim in Appendix D, E and F, respectively.

STATEMENT OF THE CASE

I. Proceedings Below.

The Petitioner, Brittan Communications International Corporation ("Brittan"), is a Texas Corporation with its principal place of business in Houston, Harris County, Texas.

Brittan filed suit against Southwestern Bell Telephone Company ("SWBT") originally in Texas state court alleging violations of Title 47 U.S.C. § 202(a). SWBT removed Brittan's claims to Federal District Court for the Southern District of Texas, Galveston Division, based upon federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

The question presented in this case arises from Brittan's complaint that SWBT discontinued billing services for Brittan without justification which constituted discrimination in violation of 47 U.S.C. 202(a). SWBT filed a motion for judgment on the pleadings, or, in the alternative, a motion for summary judgment on all of Brittan's claims. The district court granted SWBT's motion for judgment on the pleadings, and determined Brittan had not alleged a cognizable claim under § 202(a). (App. B at 27a-28a). According to the district court, billing and collections services are not common carrier communications services, and therefore not subject to the regulations of Title II of the Communications Act. (App. B at 27a).

Brittan appealed the district court's decision to the Court of Appeals for the Fifth Circuit. The panel affirmed the district court's ruling on Brittan's 202(a) claim with one judge dissenting. The court held that since Brittan's claims did not fall within the scope of § 202(a), the district court was

correct in granting SWBT's motion for judgement on the pleadings.

II. Background Facts.

1. The relationship between Brittan and SWBT.

Brittan began operations in 1995 as a switchless long-distance reseller competing in the long distance telephone market in the wake of the breakup of AT&T. (R. 764, 817). Like most long distance resellers, Brittan depended on local exchange carriers ("LEC"), like SWBT, to provide billing access to Brittan's long distance customers. (R. 596, 764). SWBT provided billing and collections services for hundreds of long distance carriers through both direct contracts and billing clearinghouses. (R. 810). By using billing clearinghouses, LECs like SWBT, avoid the substantial costs involved in setting up and maintaining direct contracts between each LEC and each provider seeking the service. (R. 596).

Billing Information Concepts, Inc. ("Billing Concepts"), contracted with Brittan to act as its billing agent in contracting with each of the LECs to provide billing and collections services to Brittan. (R. 764). This allowed SWBT to provide, and Brittan to obtain, billing and collection services without the necessity of a direct contract between the two entities. (R. 596). Brittan actively operated its business under this system for a period of four years. (R. 763-64).[1]

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[1] The record is numbered in reverse sequential order. When citing to the record, pages will be referenced in sequential order, *e.g.*, pages 1-4 instead of pages 4-1.

2. SWBT terminates Brittan's billing services.

On November 9, 1998, SWBT notified Billing Concepts that SWBT would no longer include Brittan's charges on its bills effective the following day. (R. 614). When SWBT made this decision, it was aware of the potentially lethal impact such action could and likely would have on a company like Brittan, a potential future competitor of SWBT's in the long distance market. (R. 742). As an explanation for this sudden, predictably devastating action, SWBT contended that a "random sampling" of "complaints" by end-users against Billing Concepts' customers allegedly revealed that Brittan had more complaints than any others. (R. 843).

In conducting the "random sampling," SWBT characterized every end-user call regarding other carriers as a "complaint," prompting its own employees to question the fairness of such classification. (R. 666). In fact, the "random sampling" was inexplicably skewed in favor of Billing Concepts' largest customer, Worldcom, and against Brittan. (R. 620-23, 735, 928, 930). Furthermore, SWBT did not compare the "complaints" against Brittan to those of long distance carriers represented by other billing clearinghouses. (R. 433, 625-26, 735).

3. SWBT's reason for terminating Brittan's billing and collections.

SWBT defended its decision to terminate Brittan's billing and collections by claiming that Brittan was a "crammer" and a "slammer." "Cramming" is adding charges to an end-user's bill for services that were not authorized or received. (R. 666). Brittan never engaged in this practice. (R. 763). During 1998, the Federal Communications

Commission ("FCC") implemented several new fees imposed on long distance providers which it permitted carriers to pass on to end-users. (R. 763). Problems immediately arose because end-users were unfamiliar with the new fees appearing on their bills and LECs, like SWBT, limited the length of the text explanation a long distance provider could place on the bill. (R. 694-95). As a result, customer service calls increased during this period. (R. 695). SWBT characterized these calls as "cramming" complaints. (R. 666). All of the calls included in SWBT's "random sampling" of Brittan involved these types of legitimate charges, authorized by the FCC. (R.620-25).

When SWBT's characterization of the customer service calls was challenged, SWBT altered its position and alleged the complaints were the result of "slamming." (R.431-32). "Slamming" is the unauthorized changing of a customer's long distance carrier whether intentional or not. (R. 763). Frequently, slamming is traceable to the complexities of telecommunications technology, data entry errors, area code changes, end-user misunderstanding and, on occasion, to rogue employees. (R. 910-11). Brittan, like every carrier small or large, had faced this problem and had taken extensive steps to address it in every feasible way. (R. 685, 910-11). By the fall of 1998, Brittan had completely revamped its marketing plan to eliminate programs that appeared susceptible to end-user confusion. (R. 671-85).

Despite these efforts, another problem arose which resulted in an end-user being unintentionally charged for fees by someone that was not its current long distance carrier. The telecommunications industry uses an electronic process to communicate the status of an end-user's long distance service. (R. 684-85). Through this process, codes are used to communicate between the long distance carriers and the

LECs, like SWBT. (R. 684-85). When an end-user authorizes a carrier to switch its long distance to that carrier's network, the carrier communicates that information through a code to the LEC. (R. 684-85, 687-89, 699). The LEC confirms the change to the carrier through another code. (R. 684-85, 687-89, 699). Additionally, the LEC is supposed to send a code to the end-user's former carrier to let that carrier know that the end-user has switched service providers. (R. 684-85, 689). When these codes are not promptly and accurately communicated by the LEC, end-users receive incorrect charges. (R. 684-85, 699).

Brittan experienced this problem. For months, both Brittan and Billing Concepts recognized the problem of not having accurate and timely codes forwarded by the LECs. (R.684-85, 687-89). Upon investigating the 34 complaints found in SWBT's "random sampling," Rob Taylor, one of Brittan's in-house attorneys and Director of Regulatory Affairs, immediately recognized that the complaints were related to untimely, inaccurate codes from SWBT. (R. 671-85).

These facts formed the basis for Brittan's contention that SWBT had subjected Brittan to undue disadvantage and unreasonable discrimination in suddenly terminating its billing and collections services.

4. SWBT represents that Brittan's billing and collections will be resumed.

Upon discovering that its billing and collections had been terminated, Brittan worked vigorously to take all necessary actions to have its billing resumed. (R. 632, 685). In addition to its own efforts, Brittan representatives spoke directly to SWBT's representative, Dick Oxler. (R. 391-92).

During this conversation, SWBT represented it would promptly accept Brittan's billing records when Billing Concepts forwarded them to SWBT. (R. 390-91). Relying on SWBT's representation, Brittan continued to allow its customers to incur long-distance charges. (R. 763). SWBT's representation proved to be false. (R. 762-63). Although SWBT eventually resumed billing services, Brittan's relationship with its creditors was beyond repair and it was forced into voluntary foreclosure. (R. 385-87).

JUSTIFICATION FOR GRANTING BRITTAN'S PETITION

III. Brittan's petition presents vital questions regarding the interpretation of the Communications Act which should be answered by this Court.

In reaching its decision, a majority of the panel of the Fifth Circuit agreed with the district court's ruling that billing and collections services that do not utilize communications over a common carriers wire or radio facilities are not communication services subject to regulation under Title II of the Communications Act. (App. A at 7a-8a). According to the majority, the FCC has stated a clear position concerning billing and collections under Section 202(a). (App. A at 8a). However, the FCC's position that Title II does not encompass a cause of action for discrimination in billing and collections services has been inconsistent and clearly arbitrary given the express language of Section 202(a).

As the Fifth Circuit noted, no cases or FCC opinions were cited by Brittan in which billing and collection services provided by LECs to unaffiliated long-distance providers were held to fall within the scope of Title II. (Appendix A at 10a). Brittan does not dispute this point. However, as Judge

Dennis noted in his dissent, despite the fact that the "FCC has only chosen to regulate billing and collection services involving [LECs] and its local telephone customers, this does not mean that Title II and Section 202(a) do not encompass all billing and collection services." (Appendix A at 17a). According to the FCC, despite the fact that billing and collections services are "communication services," they still do not fall within the scope of Title II. Because this interpretation is contrary to the express terms of the statute and analogous situations where the FCC has afforded Title II protection, this Court should resolve once and for all the question of whether federal law allows entities such as Brittan to bring a cause of action for discrimination in billing and collections services under Section 202(a).

A. Section 202(a) prohibits discrimination.

With the passing of the Communications Act, Congress sought to change the face of the monopolistic telecommunications industry. *Nat'l Communications Ass'n Inc. v. AT&T* Corp., 238 F.3d 124, 131 (2d Cir. 2001). To this end, Section 202(a) of the Communications Act provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a) (2001). The act defines a "common carrier" or "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . ." 47 U.S.C. § 153 (2001). The term "communication service", however, is not specifically defined in the Act.

Several courts, in addressing the congressional intent behind Section 202(a), have recognized that it should be broadly applied. In *American Trucking Ass'n, Inc. v. FCC*, the court observed:

> The pertinent section of the statute bristles with "any." It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. Moreover it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy.

377 F.2d 121, 130 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). In *Western Union Int'l, Inc. v. FCC*, the Second Circuit disapproved of the defendant's attempt "to gloss over the language of § 202(a), which forbids 'unjust or unreasonable discrimination in charges' in connection with the provision of 'like' communication services." 568 F.2d 1012, 1017-18 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978). The court reasoned that "[b]y its terms, the statute embodies *an absolute obligation* to prevent such discrimination in the public interest regardless of the needs of particular users or other policy considerations." *Id.* at 1018. (emphasis added).

B. The FCC's interpretation of Billing and Collections services.

The threshold issue that must be addressed is whether the FCC views billing and collections services as communication services under the act. In 1986 the FCC decided billing and collections services should be detariffed. *See Detariffing of Billing and Collections Serv.*, 102 F.C.C.2d 1150 (1986). ("*Detariffing Order*"). As the apparent basis for this decision, the commission opined that billing and collections services were competitive and could be provided effectively by non-carriers, although the FCC admitted there was no evidence to support its conclusion. *Detariffing Order*, 102 F.C.C.2d 1150 at ¶ 38, n.2. In the *Detariffing Order*, the FCC concluded that billing and collections services were not a "communication service," but were instead a "financial and administrative service." *Id.* at ¶ 32.

In the years following the *Detariffing Order*, the FCC showed signs of retreat from its initial position on billing and collections services. In 1989, the FCC issued a decision softening its position that billing and collections services were competitive and without need for regulation:

> Billing and collection services of the kind provided by C & P for AT&T directly affect the conditions under which interstate carriers offer transmission services. The rates that [LECs] charge for billing and collection directly affect the costs of providing interstate transmission service and hence the rates that [interexchange or long-distance carriers] must charge their interstate customers. Moreover, . . [disconnection for nonpayment] is integral to the

billing and collection service that C & P provides to interstate carriers. . . .

Besides "affecting" interstate communications, the billing and collection service that C & P provides for AT&T are also "closely related to the provision of [such] services," since billing and collection must occur accurately and efficiently for an interstate carrier to offer its services on an economically sound basis. From a technical perspective, [disconnection for nonpayment] and the call detail recording function are two integral components of the billing and collection services that C & P provides to interstate carriers that are closely related to the interstate communication services of those carriers. [Disconnection for nonpayment] and recording are each performed as a function of the [LECs'] provision of interstate communications service . . . that other, non-carrier vendors of billing and collection services cannot provide.

When one interstate carrier is performing billing and collection for the interstate services of another interstate carrier under circumstances like those involved in C & P's relationship with AT&T the billing and collection service is incidental to interstate communications and subject to our Title I jurisdiction.

Pub. Serv. Comm'n of Md., 4 F.C.C.R. 4000, ¶ 40-43 (1989).

Finally, in 1992, the FCC formally reversed its position that billing and collections services were not "communication services" within the meaning of the Act. *Local Exchange Carrier Validation and Billing Info for Joint Use Calling Cards (Report and Order)*, 7 F.C.C.R. 3528 (1992). In that opinion, the FCC conceded that its earlier decisions had been "inconsistent" and that "[u]pon further analysis, we believe . . . that billing and collection is incidental to the transmission of wire communication and thus *is properly considered a communication service* under Section 3(a) of the Act." *Id.* at ¶ 26, n. 50 (*emphasis added*).

The FCC's decision finally and officially recognized the integral nature of billing and collection services to communications and the unique position that LECs have in relation to those services. Since 1992, the FCC has not diverged from its position that billing and collections services are communication services under the Act.

C. Although classified by the FCC as communication services, billing and collections services remain outside the scope of Title II.

While stating with certainty in its 1992 decision that billing and collection is a communication service, the FCC asserted an inexplicable caveat to the effect that "[b]illing and collection, of course, remains outside the scope of Title II because it is not a common carrier service." *Id.* In reliance on the FCC's 1992 decision, but noting that the Act makes no distinction between communication services under Title I and Title II of the Act, the United States Tax Court, in characterizing billing and collections services for tax purposes, concluded that billing and collections services are "communication services" for purposes of the

Communications Act. *Golden Belt Tel. Ass'n, Inc. v. C.I.R.*, 108 T.C. 498, 504 (1997).

The *Golden* court's conclusion, which was based upon a comprehensive analysis including FCC decisions, is consistent with the judiciary's view that the Communications Act should be broadly interpreted to prevent *any and all discrimination.* (*emphasis added*). Concerning the application of Section 202(a), Judge MacKinnon, in a concurring opinion, explained the breadth with which the section is to be applied:

> The clear thrust of this statute is to prohibit any discrimination, preference or advantage by a carrier in favor of one customer over his competitors if all of them are seeking to purchase the same or a like communication service. The word "service" should be given its full meaning which inter alia includes supplying any needs that are in general demand for accommodation of consumers to promote the use of all communication facilities that are available. *The word "service" as it is used in section 202(a) refers to the entire package of benefits, rights, restrictions, duties, facilities and services contracted for between the customer and the communications carrier and is not restricted to the physical facilities that are used in long distance calls.*

Ad Hoc Telecomm. Users Comm. v. FCC, 680 F.2d 790, 803-804 (D.C. Cir. 1982) (MacKinnon, J., concurring) (emphasis added).

1. The FCC's decision that billing and collections services are communication services not covered by Title II of the Act is arbitrary.

In its 1989 decision, the FCC reasoned that billing and collections services by a LEC, a common carrier, "directly affect the conditions under which interstate carriers offer transmission services" and *are different* from the functions "non-carrier vendors of billing and collection services" can provide. As a result, in 1992, the FCC formally acknowledged that billing and collections services are communication services within the Act. As subsequent FCC decisions have established, the FCC's decision to classify billing and collections as a communication service was necessary and correct given the current realities of the telecommunication industry.

In light of the considerations that ultimately lead to the FCC's decision to classify billing and collections as a communication service, the FCC's unreasoned conclusion that billing and collections services are "outside the scope of Title II because it is not a common carrier service" disregards the express terms of the statute. It is beyond reasonable dispute that billing and collections is a service provided by common carriers in connection with other communication services. To the extent billing and collections services are provided by common carriers, it is regulated under the plain language of Title II.

This Court established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, the analytical framework for judicial review of an administrative agency's interpretation of a statute. 467 U.S. 837 (1984). First, a court must establish whether the intent of Congress is clear from the statute. *Id.* at

88. If intent is clear on its face, that intent controls, and the inquiry is over. *Id.* at 842-43. However, if the court determines that the statute is ambiguous, the question becomes whether the agency's resolution of the ambiguity is based on a permissible construction of the statute. *Id.* at 843. To be permissible, an agency's interpretation of a statute must be reasonable, and not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

If the agency's interpretation is reasonable, courts must defer to it rather than form their own construction of the statute. Thus, under *Chevron*, the interpretation of the administrative agency should not even be considered by the court until it first determines that the statute is unclear on its face. As one appellate court has phrased it, "[i]t is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation." *Bank of Am., N.A. v. FDIC*, 244 F.3d 1309, 1319 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 902 (2002).

Once it is determined that the statute is silent or ambiguous in some respect, the court may consider the agency's interpretation. However, "[a]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (affirming court of appeals' decision striking an FCC detariffing order because it resulted in a "wholesale abandonment or elimination of a [statutory] requirement"). Moreover, "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421,

446, n. 30 (1987); *see also Watt v. Alaska*, 451 U.S. 259, 273 (1981).

In 1993, in a context analogous to billing and collections services, the FCC decided to require LECs to provide non-discriminatory access to validation and billing information for joint use calling cards to any long distance carrier. *Local Exchange Carrier Validation and Billing Info. for Joint Use Calling Cards (Second Report and Order)*, 8 F.C.C.R. 4478, ¶ 42 (1993). In that opinion, the FCC described the proper analysis for determining whether a service is governed under Title II of the Act:

> Title II grants the Commission specific regulatory authority over common carriers engaged in the provision of interstate or foreign communication services. "Communications service" and "common carrier" are defined in Title I. In order to determine whether the [LECs'] provision of access to validation data is subject to our jurisdiction and to the requirements of Title II, we must determine whether such validation service falls within these definitions. Thus, we must answer two questions. First, is the activity an interstate or foreign communications service? And second, is the person or entity providing the service offering it as a common carrier? For the reasons discussed below, we conclude that, for the [LECs'] validation and screening services, the answer to both questions is yes.

Id. at ¶ 18. Significantly, this opinion represents the FCC's clear determination that the term "communications service"[2] under Title II is the same as, the term "communications service" established by Title I.

By applying the FCC's *own* analysis to billing and collections services, there can be no question that such services are subject to the requirements of Title II. The FCC has unequivocally determined that billing and collections services, represent a "communication service." Moreover, according to the FCC's own reasoning, there is no distinction between a "communication service" under Title I and a "communication service" under Title II. Finally, since LECs are common carriers under the Act, and are providing these services in that capacity, billing and collections services provided by LECs must be subject to the requirements of Title II.

This conclusion is supported by the FCC's own interpretation of the goals and aspirations of the Telecommunications Act of 1996. The FCC has observed that the 1996 Act mandated that "obstacles to the growth of competition in all communications" be removed. *Calling Party Pays Serv. Offering in the Commercial Mobile Radio Serv.*, 14 F.C.C.R. 10,861 ¶ 5 (1999). As a result of these changes, the FCC recognized that *billing and collections services are regulated under Title II* and were subject to non-discrimination requirements:

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[2] In both the statute, the FCC opinions, and relevant cases, the terms "communications service" and "communication service" are used inconsistently, and apparently, interchangeably.

> In some instances where the provision of billing and collection services has not been required, there have been nondiscrimination requirements. For instance, in the 1996 Telecommunications Act, Congress added Section 272 requiring Bell Operating Companies (BOCs) who wished to provide certain types of services to provide them through separate affiliates. Section 272(c)(1) of the Act provides that BOCs may not discriminate between such affiliates and "any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards . . . ." In implementing that section, we held that to the extent a BOC provides billing and collection services to an affiliate, such services were subject to the non-discrimination requirements of Section 272(c)(1).

Id. at ¶ 60. Thus, the FCC acknowledged that billing and collections are subject to the common carrier requirements of Title II. In 1996, the FCC also imposed certain billing and collections service requirements on LECs' payphone service under Title II. *See Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecomm. Act of 1996*, 11 F.C.C.R. 20,541, ¶ 149 (1996).

By 1998, the FCC decided to actively involve itself in the regulation of billing and collections practices and that regulation could best be done under Title II of the act, and more specifically, under Sections 201 and 202. *See, e.g., Federal-State Joint Board on Universal Serv.*, 13 F.C.C.R. 24,744 ¶ 70 (1998). Accordingly, the FCC began regulating the manner in which a carrier bills and collects for its own

interstate offerings under Title II, "because such billing is an integral part of that carrier's communications service." *Truth-in-billing and Billing Format*, 14 F.C.C.R. 7492, ¶ 25 (1999). However, a continuing problem between the LECs creating the bills and the carrier providing the long distance service was agreeing to the form and substance of the bill. (R. 694-95). Thus, by regulating how a carrier bills and collects for its own offerings under Title II, the FCC was necessarily regulating the relationship between the carrier providing the service and the one billing for it.

Similarly, in connection with the billing text phrases used to identify the "universal service fund contributions" paid by end-users, the FCC stated:"[w]e believe that a carrier's billing and collection practices for communications services are subject to regulation as common carrier services under Title II of the Act." *Federal-State Joint Board*, 13 F.C.C.R. 24,744 at ¶ 70. At the time, SWBT was dictating to Brittan and other resellers, through an "approval" process how such fees could be described in the end-user's bill. (R. 694-95). Thus, while the FCC was saying that it was holding the service provider responsible for proper description of the charges, Brittan could only use descriptions approved by SWBT. (R. 694-95). It stands to reason that the FCC cannot effectively regulate a carrier's billing and collections practices, without simultaneously regulating SWBT's provision of billing and collections services to other carriers under Title II as well. This conclusion is supported by the court's decision in *Assoc. of Communications Enterprises v. FCC*. 235 F.3d 662 (D.C. Cir. 2001).

In *Assoc. of Communications Enterprises*, Ameritech Corporation and SBC Communications Inc., two of the largest incumbent local exchange carriers ("ILECs"), filed a joint application requesting approval to transfer licenses and lines

owned by Ameritech to SBC. *Id.* at 664-665.[3] The Association of Communications Enterprises ("ASCENT"), who represented telecommunications providers and resellers, opposed the merger on the grounds that it would hinder competition. *Id.* at 665. The FCC approved the merger and permitted the new company to provide advanced services through a separate affiliate, therefore avoiding the penalties imposed by 47 U.S.C. § 251.[4] *Id.* According to the court, in approving the merger, the FCC "adopted a presumption that the advanced services affiliate is not such a successor or assign so long as it complies with various structural and transactional safeguards." *Id.*

On appeal, the FCC justified its decision by arguing that since the act did not define the terms "successor or assign," that its definition should receive deference under this Court's decision in *Chevron*. *Id.* at 666. According to the court, the FCC reached its determination that an affiliate is not a "successor or assign" because the company did not transfer its monopoly assets. *Id.* The court reasoned that the FCC, by defining "successor or assign" in such a manner, permitted an ILEC to transfer advanced services to an affiliate and avoid the resale obligation imposed by § 251. *Id.*

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[3] Ameritech and SBC sought to transfer "advanced services" which are defined by the Act as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." *Id.* at 664.

[4] Section 251(c)(4), requires ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *Id.* at 664.

In vacating the FCC's order, the court held that the FCC's interpretation of the Act was unreasonable. *Id.* In so holding, the court stated that the FCC would not be allowed to use the "successor or assign limitation as a form of legal jujitsu to justify its relaxation of § 251(c)'s restrictions." *Id.* at 667. Furthermore, since Congress failed to provide for an affiliate structure for advanced services, the court assumed that Congress did not intend for the use of an affiliate structure to be used to avoid the obligations of § 251. *Id.* at 668.

This very same legal jujitsu has been utilized in this case to relax the provisions of § 202(a). According to the courts below, since the FCC has not specifically stated that billing and collections services are communication services provided by a common carrier, Brittan and every other long distance reseller is prohibited from filing a 202(a) claim, at least until the FCC specifically authorizes such action. Yet, the express language of the statute and the FCC's determination that the term "communication services" means the same under Title I and Title II, appear contrary to the lower court's rulings.

The language of the statue itself, approves by its express terms the right to bring a cause of action against a common carrier who discriminates in any manner in providing communication services. The statue clearly provides that it is unlawful for a common carrier to discriminate in services for or in connection with like communication service. SWBT is a common carrier under the definition articulated by Congress, and according to the FCC, billing and collections are communication services. Therefore, it appears that Section 202(a) encompasses Brittans' claims, despite the FCC's interpretation.

2. The FCC has determined that similar communication services are subject to Title II.

Even assuming that this Court disagrees with petitioner's position that the express language of § 202(a) does not prohibit Brittan's claims, there is an additional reason why this Court should address whether the FCC's interpretation of § 202(a) is correct. On numerous occasions, the FCC has found analogous services, incidental to traditional telecommunications services, subject to Title II regulation. For example, in 1993, the FCC decided it could regulate the provision of billing name and address information as a "common carrier service" under Title II to ensure that LECs would provide such information to other carriers on a nondiscriminatory basis. *See Local Exchange Carrier Validation*, 8 F.C.C.R. 4478 at ¶ 20. Similarly, the FCC has required incumbent LECs, like SWBT, to provide access to telephone numbers to entities, such as paging carriers, concluding that such service is subject to the requirements of Section 202(a). *See Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, 11 F.C.C.R. 19,392, ¶ 329 (1996).

In 2000, the FCC again subtly retreated from its earlier position, that billing services were "outside the scope of Title II." Rather, the FCC would merely say that "billing services are not subject to *tariff* regulation under Title II of the Act." *Teleservices Indus. Ass'n v. AT&T Corp.*, 15 F.C.C.R. 21,454 ¶ 2, n.5 (2000). Yet, the FCC itself has clearly recognized that the obligations of §202(a) apply to *detariffed* communications services as well. *Interstate, Interexchange Marketplace*, 11 F.C.C.R. 20,730 ¶ 27 (1996). Justice Stevens recognized this fact in his dissenting opinion in which he noted that the existence of tariff regulation is not

determinative of private liability under Title II. *MCI,* 512 U.S. at 235.

The FCC has also retreated from its position that billing and collections services are competitive. In 1997, the FCC conceded that the LECs ability to disconnect service for an end-user impeded competition for billing and collections of toll charges, and was a "special prerogative" of local exchange carriers that was "a vestige of the monopoly era." *Federal-State Joint Board on Universal Serv.*, 12 F.C.C.R. 8776, ¶ 391 (1997).

There is no rationale basis to conclude that billing and collections services are outside the scope Section 202(a). The FCC has clearly recognized that billing and collections services are "communication services" under the Act. Furthermore, "communication services", such as billing and collections, are provided by common carriers and are clearly subject to other provisions of Title II. If billing and collections services are not within the scope of Title II, then the FCC will have effectively carved out an exception to the rule it is required to enforce.

The term "communication service" is not defined in either Title I or Title II of the Act, but the same term is used interchangeably in both without distinction, and according to the FCC, has the same meaning under Title I and Title II. Had Congress intended the term "communication service" to have one definition under one title of the Act, and a completely different definition under another, Congress would have used different terms or explained the distinction. Congress did neither. Therefore, while Congress may have been silent as to the term's explicit meaning, it is clear that the meaning applied under Title II is the same as the meaning applied under Title I. Furthermore, the unreasoned

distinctions the FCC has made over the years in holding that billing and collections services and other analogous services are governed under Title II in some instances, but not others, are clearly arbitrary.

In holding that providing billing name and address information is a communication service by a common carrier under Title II, the FCC realized the fact that small long distance providers could experience discrimination if LECs were not required under Title II to provide this information. Yet, by holding that only a common carrier's billing and collection services are subject to Title II, the FCC has effectively carved out an exception to Section 202(a)'s prohibition against any discrimination. If LECs like SWBT are only required to refrain from discrimination in their own billing and collections, small potentially competitive companies like Brittan, who depend upon the LECs to provide their billing and collections services, will remain unprotected from discrimination. To this end, the goals of making the telecommunications industry less monopolistic and more competitive will be thwarted, and there will be no remedy available to companies like Brittan who are discriminated against.

Because the FCC has been inconsistent in its interpretation of Title II, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Cardoza-Fonseca,* 480 U.S. at 447-448 (quoting *Chevron,* 467 U.S. at 843). This Court should grant review of the decision below and consider whether Title II provides a remedy for Brittan and other long distance resellers for discrimination in billing and collections services provided by a common carrier.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41450

[Filed December 16, 2002]

BRITTAN COMMUNICATIONS INTERNATIONAL CORPORATION,
Plaintiff-Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
G-00-CV-480
Samuel N Kent, US District Judge

JUDGES:
Before DeMOSS, STEWART, and DENNIS, Circuit Judges.

OPINION

CARL E. STEWART, Circuit Judge:

Brittan Communications International Corporation ("Brittan") filed suit against Southwestern Bell Telephone Company ("SWBT") in Texas state court alleging, inter alia, violations of the Communications Act of 1933 ("the Act"), common law fraud, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). SWBT removed the case to federal court and filed motions for judgment on the pleadings and summary judgment. On November 9, 2001, the district court granted, inter alia, SWBT's motion for judgment on the pleadings with respect to Brittan's claim under the Communications Act and motion for summary judgment with respect to Brittan's fraud claim and its claims under the DTPA. The district court issued a final judgment and Brittan appealed. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Brittan began operating as a switchless reseller of long-distance telephone services in 1995. Brittan did not have its own telecommunications facilities, but rather leased long-distance access from two existing long-distance carriers ("Lessors"). It then resold the leased long-distance services to its customers in forty-two states.

As is common in the telecommunications industry, Brittan billed its customers through local exchange carriers ("LECs"), like SWBT. In order to do so, Brittan submitted its charges to a third-party billing aggregator with whom Brittan had a contract, namely Billing Concepts or its subsidiaries

(collectively "Billing Concepts"). Billing Concepts performed billing aggregation services for multiple long-distance providers, including Brittan. Billing Concepts aggregated Brittan's charges with those of other long-distance providers and submitted them to SWBT.[1] SWBT would then place Brittan's charges on the bills of its local telephone service customers, collect the payments due, and forward the monies received to Billing Concepts. Billing Concepts would then transfer the funds to Brittan.

On November 9, 1998, SWBT notified Billing Concepts that it would no longer accept billing records from Brittan, effective the following day. Brittan allowed its customers to continue to make long-distance calls, for which Brittan had to pay its Lessors, but Brittan was unable to bill those customers through SWBT. According to SWBT, it suspended billing services for Brittan in response to a large number of "slamming" and "cramming" complaints by SWBT's customers.[2] In September 1998, SWBT received approximately 2400 customer complaints associated with charges that Billing Concepts had tendered to SWBT for billing. In late October 1998, SWBT conducted a random sampling of 100 of these 2400 customer complaints from September. The results of the survey indicated that more

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[1] Brittan and SWBT did not have a contractual relationship. Billing Concepts, however, had a billing and collection contract with SWBT.

[2] "Cramming" refers to charging a customer for services that were not ordered, authorized, or received. "Slamming" refers to switching a customer's long-distance provider without the customer's consent.

complaints had been filed against Brittan than against any other long-distance provider billing through Billing Concepts.

On November 2, 1998, SWBT wrote to Billing Concepts explaining that it intended to suspend billing of charges generated by Brittan unless Billing Concepts could inform SWBT, by November 7, 1998, of any reasons why it should not do so. Under the terms of its billing contract with Billing Concepts, SWBT was not obligated to process "charges for services which, in SWBT's sole opinion, may result in nuisance calls to SWBT." On November 6, 1998, Brittan wrote Billing Concepts placing blame for the complaints in the sample on Brittan's Lessors. On November 9, 1998, SWBT notified Billing Concepts that SWBT would no longer accept billing records from Brittan, effective November 10, 1998, because it had not received adequate assurances from Billing Concepts that the number of complaints would be reduced in the future. In its letter to Billing Concepts, SWBT indicated that Brittan must provide SWBT with a specific action plan designed to reduce complaints in order to regain privileges. "These action plans must be specific, and need to address future actions, not reasons for past failures."

According to Brittan, SWBT's survey of complaints was skewed in favor of Billing Concept's largest customer, Worldcom, and against Brittan. Brittan contends that it never engaged in cramming and that all of the so-called cramming complaints in the survey were merely calls from customers who were unfamiliar with new fees imposed on long-distance providers in 1998 by the Federal Communications Commission ("FCC"). The FCC allowed long-distance

providers to pass these fees on to customers.[3] Brittan simultaneously contends that the complaints in the survey were due to errors in electronic transmission codes allegedly caused by SWBT.

On November 16, 1998, representatives of SWBT, Billing Concepts, and Brittan participated in a conference call. During this call, SWBT and Billing Concepts agreed that Billing Concepts would decide whether or not Brittan's billing would be reinstated. Brittan claims that SWBT's representative stated that billing services would promptly be restored as soon as Billing Concepts made the decision to forward Brittan's billing records to SWBT.

On or about November 24, 1998, Billing Concepts informed SWBT that Brittan should be reinstated on SWBT's billing tables. On December 15, 1998, SWBT resumed billing Brittan-generated charges for Billing Concepts. The money collected from those bills was paid to Billing Concepts in the normal course of business.

In June 2000, Brittan brought suit against SWBT in state court seeking damages stemming from the suspension of its billing and collection services. SWBT removed the case to federal court and filed motions for judgment on the pleadings and for summary judgment. On November 9, 2001, the district court granted SWBT's motions and entered final judgment. Brittan appeals.

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[3] Brittan concedes that it, like every long-distance provider, has had problems with slamming, but claims to have taken extensive steps to address the problem.

DISCUSSION

Brittan presents the following issues on appeal: (1) whether the district court erred in granting SWBT's motion for judgment on the pleadings on Brittan's claim under Title II of the Communications Act of 1933, 47 U.S.C. § 202(a); (2) whether the district court erred in granting summary judgment for SWBT on Brittan's common law fraud claim; and (3) whether the district court erred in granting summary judgment for SWBT on Brittan's claims under the DTPA, TEX. BUS. & COM. CODE ANN. §§ 17.45(5) and 17.46(b)(5) & (7).

I. Section 202(a) of the Communications Act

We review the grant of judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) *de novo*. *St. Paul Fire & Marine Ins. Co. v. Convalescent Serv., Inc.*, 193 F.3d 340, 342 (5th Cir. 1999). In doing so, we must look only to the pleadings and accept all allegations contained therein as true. Id. Pleadings should be construed liberally, and judgment on the pleadings is appropriate only if there are no disputed issues of material fact and only questions of law remain. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 (5th Cir. 1998). "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Hughes v. The Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001) (quoting *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000)).

Title II of the Communications Act outlines the duties of common carriers in the provision of interstate or foreign

communication services and establishes procedures for enforcement of those duties. 47 U.S.C. §§ 201-224. Brittan claims that SWBT's temporary suspension of billing and collection services violates § 202(a) of the Act. Section 202(a) states as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a) (2001).

The district court aptly looked for guidance from the FCC - the agency charged with administration of the Communications Act - in determining whether Brittan's claim fell within the scope of § 202(a). After reviewing the pertinent FCC decisions, the district court determined that "the relevant principle that can be extracted from these FCC decisions is that billing and collection services that do not utilize communications over the common carrier's wire or radio facilities are not 'communications services' regulated by Title II of the Communications Act." Thus, the district court concluded that Brittan had not alleged a cognizable § 202(a)

claim. We agree that the FCC has stated a clear position on this issue. In light of the FCC's position, we agree with the district court's conclusion. *See* generally *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 122 S. Ct. 1646, 1687, 152 L. Ed. 2d 701 (2002) (reinstating FCC pricing and unbundling rules because they effectuated a reasonable interpretation of the Act).

To discern the FCC's position, we look to the history and purpose of the agency's decisions. In 1986, the FCC issued a decision which resulted in the detariffing of billing and collection services under Title II of the Act. In the *Matter of Detariffing of Billing & Collection Services*, 102 F.C.C.2d 1150 (1986). The FCC analyzed the scope of its jurisdiction under Title II and stated the following:

> Two distinct questions must be asked in order to determine whether a particular activity is subject to such Title II regulation. Is the activity an interstate or foreign communication service? Is the person or entity offering the service as a common carrier? Although carrier billing and collection for a communication service that it offers individually or as a joint offering with other carriers is an incidental part of a communication service, we believe that carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act.

Id. P 31 (emphasis added). Rather, the FCC explained that billing and collection were "financial and administrative

services." *Id.* P 32. Thus, according to the FCC, "billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act." *Id.* P 34; *see also Int'l Audiotext Network, Inc. v. AT&T*, 893 F. Supp. 1207, 1223-24 (S.D.N.Y. 1994) (noting that billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act which includes 47 U.S.C. § 202 (a)); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 F.C.C. Rcd. 3528, 3533 n.50 (1992) (affirming that "billing and collection, of course, remains outside the scope of Title II because it is not a common carrier service").

The FCC conducted its analysis in response to the changed landscape of the telecommunications industry due to the breakup of the Bell System. As the D.C. Circuit explained:

> In 1986, the FCC reexamined both its post-breakup jurisdiction to regulate the LECs' provision of billing and collection services and the desirability of continued regulation. The FCC acknowledged that it could no longer exercise jurisdiction over billing and collection services on the basis of Title II of the Act because it was now apparent - after the breakup - that these services were not "common carrier services." Instead, it rested its jurisdiction in this area on its authority under Title I to regulate (or deregulate) services "incidental" to the transmission of communication by wire. Moreover, seeing that

> the LECs were facing competition in the billing and collection area, and therefore that a market for these services was developing, it decided to eliminate all rate regulation of the billing and collection services provided by the LECs to interexchange carriers.

Pub. Serv. Comm. of Md. v. FCC, 285 U.S. App. D.C. 329, 909 F.2d 1510, 1512 (D.C. Cir. 1990) (citations omitted).

Brittan contends that the FCC has retreated in recent years from its earlier position that billing and collection services are financial and administrative services, outside the scope of Title II. Although it may be true that the FCC has moved away from the position that billing and collection services are financial and administrative services, this does not persuade us to conclude that the billing and collection services at issue in this case fall within Title II. Brittan has cited no FCC decision in which the FCC has altered its view that billing and collection services provided by LECs to unaffiliated long-distance providers fall outside the scope of Title II. *See In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C. Rcd. 24,744, P 70 & n.87 (1998) (finding that billing and collection services are subject to Title II, but only as to a carrier's own billing and collections). Likewise, Brittan has cited to no case holding that billing and collection services fall within the scope of Title II. Alternatively, Brittan contends that the FCC's position is arbitrary, thus it should not be afforded deference by this Court. We disagree. Accordingly, because the type of claim asserted by Brittan does not fall within the scope of Title II, we affirm the district court's grant of SWBT's motion

for judgment on the pleadings with regard to Brittan's §202(a) claim.

II. Fraud Claim

We review the grant of summary judgment *de novo*. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 278 (5th Cir. 2001). Summary judgment is appropriate only when the record indicates "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56. "Questions of fact are reviewed in the light most favorable to the nonmovant and questions of law are reviewed de novo." *Mowbray*, 274 F.3d at 278-79.

In order to prove fraud under Texas law, Brittan must show that: (1) SWBT made a material representation; (2) that was false; (3) SWBT knew that it was false or made it recklessly without knowledge of its truth; (4) SWBT intended to induce Brittan to act upon the representation; (5) Brittan actually and justifiably relied upon the representation; and (6) Brittan was injured as a result. *Ernst & Young L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577, 44 Tex. Sup. Ct. J. 955 (Tex. 2001). The dispositive element here is whether Brittan justifiably relied upon the representation. A "determination of justifiable reliance turns on 'whether - given the fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud - it is extremely unlikely that there is actual reliance on the plaintiff's part.' " *Quest Exploration & Dev. Co. v. Transco Energy Co.*, 24 F.3d 738, 742 (5th Cir. 1994) (quoting *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990)).

On appeal, Brittan argues that it was harmed by SWBT's misrepresentation regarding the time frame for resuming billing services for Brittan. According to Brittan, during the November 1998 conference call, SWBT assured Brittan that it would "resume billing for Brittan promptly as soon as Billing Concepts was willing to forward the billing." Brittan contends that it relied on these representations in making business decisions, most importantly allowing its customers to continue to use long distance services at its expense.

The district court concluded that Brittan's fraud theory was fatally flawed because Brittan failed to claim that it justifiably relied on the alleged misrepresentation by SWBT, an element of the claim. The parties agree that at the end of the conference call, the decision of when, and if, Billing Concepts would resume submitting Brittan-generated charges to SWBT was left entirely up to Billing Concepts, not SWBT. As the district court summarized the situation, "because Brittan was aware that Billing Concepts may not have ever agreed to resume its submission of Brittan's charges to SWBT, Brittan cannot prove that it justifiably acted upon the alleged misstatement by SWBT." (emphasis in original). We agree. Examining the "facts and circumstances at or before the time of the alleged fraud," it is clear that neither Brittan nor SWBT knew if Brittan's billing services were going to be restored by Billing Concepts. Any reliance, even if actual, was not justifiable. Any alleged misrepresentation by SWBT regarding the length of time it would take to restore billing services was essentially meaningless given that the decision of when, and if, to resume rested with Billing Concepts.

For the foregoing reasons, we affirm the district court's grant of summary judgment for SWBT on Brittan's fraud claim.

III. DTPA Claims

Brittan claims that SWBT's alleged misstatement during the November 1998 conference call forms the basis for its claims that SWBT committed "false, misleading, or deceptive acts" in violation of § 17.46(b)(5) & (7), and acted unconscionably in violation of § 17.45(5).[4] The district court granted SWBT summary judgment on Brittan's DTPA claims.

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[4] Under § 17.46(b)(5), "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not" is a false, misleading, or deceptive act. Under § 17.46(b)(7), "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another" is a false, misleading, or deceptive act. Finally, an "unconscionable action or course of action" under the DTPA "means an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 2002). "To prove an unconscionable action or course of action, a plaintiff must show that the defendant took advantage of his lack of knowledge and that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated." *Bradford v. Vento*, 48 S.W.3d 749, 760, 44 Tex. Sup. Ct. J. 655 (Tex. 2001) (internal quotations omitted).

As we explained above, we review the district court's grant of summary judgment *de novo*.

To maintain a cause of action under the Texas DTPA, Brittan must establish that (1) it is a consumer under the DTPA with respect to its claim against SWBT; (2) SWBT committed a false, misleading, or deceptive act under §17.46(b) of the DTPA, breached an express or implied warranty, or engaged in an unconscionable action or course of action; and (3) these acts were the producing cause of Brittan's actual damages. *Brown v. Bank of Galveston, N.A.*, 963 S.W.2d 511, 513, 41 Tex. Sup. Ct. J. 437 (Tex. 1998). The DTPA defines "consumer" as "an individual, partnership, [or] corporation . . . who seeks or acquires by purchase or lease, any goods or services." TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 2002). To qualify as a consumer, and thus to have standing to sue under the DTPA, Brittan must satisfy two requirements: (1) it must have sought or acquired goods or services by purchase or lease; and (2) the goods or services purchased or leased must form the basis of the complaint. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981). "If either requirement is lacking, the person aggrieved by a deceptive act or practice must look to the common law or some other statutory provision for redress." *Id.* For liability to be imposed under the DTPA, the defendant's deceptive conduct must have occurred "in connection with" a consumer transaction. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649, 39 Tex. Sup. Ct. J. 351 (Tex. 1996).

SWBT argues that Brittan is not a "consumer" within the meaning of the DTPA because Brittan bases its DTPA claims on its contention that SWBT wrongfully suspended its

billing and collection services and that SWBT did not promptly reinstate these services. Brittan does not claim that it encountered problems with the quality of the billing and collection services themselves.

In *American Distributing Corp. v. ACS Communications, Inc.*, this Court held that a former exclusive distributor's claim against a supplier who unilaterally terminated the distribution agreement did not state a claim under the Texas DTPA because, although the distributor purchased goods from the supplier, the claim was based on the suspension of the distributorship, rather than any fault in the goods. 990 F.2d 223, 227 (5th Cir. 1993); *see also Footloose, Inc. v. Stride Rite Children's Group, Inc.*, 923 F. Supp. 114, 116 (N.D. Tex. 1995) (holding that a dealer in shoes did not state a cause of action against a manufacturer for violation of the DTPA, as the dealer alleged only that the manufacturer wrongfully terminated the sales relationship, and had not made any claims that the shoes were defective). We conclude that this case poses a similar situation. In light of our previous decision in *American Distributing Corp.*, we hold that Brittan does not qualify as a "consumer" under the DTPA, and thus does not have standing. Thus, we affirm the district court's grant of summary judgment for SWBT on each of Brittan's claims under the DTPA.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of judgment on the pleadings for SWBT on its claim under the Communications Act and its grant of summary judgment for SWBT on Brittan's common law fraud claim and its claims under the Texas DTPA.

AFFIRM.

DENNIS, Circuit Judge, concurring in part and dissenting in part:

While I join in the majority's opinion on the Texas Deceptive Trade Practices Act claim, I respectfully dissent on the Communications Act and common law fraud claims for the following reasons.

I. Section 202(a) Claim

Because the FCC has reversed its position on whether it may regulate billing and collection services under Title II of the Communications Act, Brittan should be allowed to maintain an action based on Section 202(a) of the Communications Act.[5] Therefore, the district court should not have granted judgment on the pleadings.

In determining whether Brittan may maintain an action under Section 202(a) of the Communications Act, we must examine whether the FCC considers billing and collection services to be common carrier communication services, which are subject to regulation under Title II and Section 202(a). However, in conducting this inquiry, the question is not whether the FCC is actually regulating billing and collection services under Title II, but rather whether the FCC *can* regulate billing and collection services under this Title.

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[5] Title II regulates common carrier communication services in general. More specifically, Section 202(a) is a provision of Title II and prohibits discrimination involving common carrier communication services.

In 1986, the FCC held that billing and collection services were not subject to Title II regulation because: (1) they were financial and administrative services, not communication services, and (2) they were not common carrier services. *In re Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150 (1986). In 1992, the FCC changed its position and declared that billing and collection services were communication services, but not common carrier services. *In re Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 F.C.C.Rcd. 3528, 3533 n.50 (1992). Therefore, these services were still not subject to Title II regulation. *Id.* However, in 1998, the FCC changed its position again and held that billing and collection services are common carrier services and subject to Title II regulation. *In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.Rcd. 24,774, P 70 (1998)("We believe that a carrier's billing and collection services are subject to regulation as common carrier services under Title II.").

Although the FCC has only chosen to regulate billing and collection services involving local exchange carriers and its local telephone customers, this does not mean that Title II and Section 202(a) do not encompass all billing and collection services. In 1999, the FCC explained that whether particular billing and collection services are actually regulated or not depends on whether regulation is needed to protect competition. *In re Calling Party Pays Services Offering in the Commercial Mobile Radio Services*, 14 F.C.C.Rcd. 10,861, P 59 (1999)("In considering the regulatory treatment of billing and collection services, we observe that we have generally declined to regulate the provision of billing and collection services unless regulation is needed to protect

competition."). Consequently, although the FCC currently declines to regulate certain aspects of billing and collection services under Title II, the FCC still has the capacity to regulate these services, including billing and collection services involving long-distance providers such as Brittan.

Because the FCC considers billing and collection services to be covered by Title II and Section 202(a), Brittan should be allowed to maintain its Communications Act claim against SWBT, and the district court's judgment on the pleadings should be REVERSED.

II. Common Law Fraud Claim

I also disagree that the district court properly granted summary judgment on the common law fraud claim was proper because Brittan could not have justifiably relied on SWBT's promise to promptly restore service as a matter of law. Brittan could have reasonably believed that (1) Billing Concepts would allow billing and collection services to resume and (2) after that approval came, SWBT would restore service within a "day or two." Therefore, Brittan could have justifiably relied on SWBT's promise to restore service, believing that SWBT would restore service within two days after Billing Concepts ordered service to resume, not the three weeks it actually took.

It is true that Billing Concepts, not SWBT, controlled whether billing and collection services would resume. However, the relationship between Brittan and Billing Concepts, as well as Billing Concepts' financial incentive in allowing SWBT to resume service, could allow Brittan to reasonably believe that Billing Concepts' approval was

forthcoming. And in fact, on November 24, within eight days of SWBT's promise to restore service, Billing Concepts did order SWBT to reinstate billing and collection services to Brittan.

Brittan could have believed that SWBT would restore service within a "day or two" after Billing Concepts' permitted service to restart. Jim Edwards, CEO of Brittan, testified in his deposition that at the teleconference on November 16, 1998, Dick Oxler, SWBT's Director of Billing and Collection, stated that he could resume billing and collection services within "the next day or two." Even if Brittan could not have reasonably believed that service would be restored by November 17 or 18, it could have justifiably relied on that statement to believe that service would be restored on November 25 or 26, in "the next day or two" after Billing Concepts ordered SWBT to restart service. Instead, SWBT did not restore service until December 15.

Because Brittan could have justifiably relied on SWBT's promise to restore service within a "day or two" after Billing Concepts ordered service to resume, summary judgment should not have been granted. Therefore, the district court's decision to grant summary judgment on the common law fraud claim should be REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
GALVESTON DIVISION

CIVIL ACTION NO. G-00-480

[Filed November 9, 2001]

BRITTAN COMMUNICATIONS INTERNATIONAL CORPORATION, Plaintiff,	)
v.	)
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)

JUDGE:
SAMUEL B. KENT, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now before the Court is Defendant Southwestern Bell Telephone Company's ("SWBT") Motion for Judgment on

the Pleadings, or, in the alternative, Motion for Summary Judgment as to claims brought by Plaintiff Brittan Communications International Corporation ("Brittan") pursuant to the Communications Act, 47 U.S.C. §§ 151-613, the Telecommunications Act of 1996, 47 U.S.C. §§ 251-53, and the Texas Deceptive Trade Practices Act, Tex.Bus.& Com.Code § 17.41 *et seq.* ("DTPA"). Also before the Court is SWBT's Motion for Summary Judgment as to Plaintiff's Texas state law claims of fraud, tortious interference with contractual relations and tortious interference with business relations. At the outset, the Court notes that the instant Motions involve hotly contested issues, extensive briefing and numerous objections by both parties to the summary judgment evidence. The Court has carefully and thoughtfully reviewed all of the materials on file in this matter, and in light of all the evidence presented, the Court concludes that, for the reasons articulated below, SWBT's Motion for Judgment on the Pleadings is **GRANTED** with respect to Brittan's claims brought pursuant to the Communications Act and the Telecommunications Act of 1996, and SWBT's Motion for Summary Judgment is **GRANTED** with respect to Brittan's DTPA, fraud and tortious interference claims.

I.

Brittan began operating as a switchless reseller of long-distance telephone services in 1995. Brittan did not have its own telecommunications facilities, but rather leased long-distance access from existing long-distance carriers. Brittan then resold the leased long-distance services to its customers in forty-two states. Brittan was headquartered in Houston, Texas and approximately 40% of Brittan's customers were

located in the five-state area within which SWBT provides local telephone service.[1]

As is common in the telecommunications industry, Brittan billed its customers through local exchange carriers, here SWBT. In order to do so, Brittan submitted its charges to a third-party billing aggregator with whom Brittan had a contract, namely, Billing Concepts or its subsidiaries, U.S. Billing and Zero Plus Dialing (collectively "Billing Concepts").[2] Brittan was one of multiple long-distance providers on whose behalf Billing Concepts performed billing aggregation services. Billing Concepts aggregated Brittan's charges with those of the other long-distance providers and submitted them to SWBT. SWBT would then place Brittan's charges on the bills of its local telephone service customers. Once the SWBT customers remitted payments, SWBT would forward the monies received to Billing Concepts, which would then transfer the funds to Brittan in due course.

In November 1998, SWBT ceased billing Brittan's customers for Brittan-generated charges, without first informing Brittan that it intended to do so. Thus, while Brittan's customers continued to make long-distance calls, for which Brittan had to pay its lessors, Brittan was unable to bill those customers through SWBT.

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[1] SWBT is licensed to provide local telephone exchange service in five states: Texas, Missouri, Kansas, Arkansas and Oklahoma.

[2] Brittan and SWBT did not have a contractual relationship. Billing Concepts, not Brittan, contracted with SWBT.

According to SWBT, it suspended billing services for Brittan in response to a large number of "slamming" and "cramming" complaints by SWBT's local customers.[3] In late October of 1998, after SWBT conducted a survey of customer complaints, SWBT concluded that resale of long-distance services by Brittan was generating a high volume of these complaints. In fact, the survey results indicated that more complaints had been filed against Brittan than against any other long-distance provider.

Before any action against Brittan was taken, SWBT sent a letter to Billing Concepts outlining its concerns regarding customer complaints. Instead of suspending its billing for Brittan-generated charges immediately, SWBT provided Billing Concepts with additional time to review the cause of the numerous complaints, and requested that Billing Concepts inform SWBT of any reasons known to Billing Concepts that would prevent SWBT from taking action against Brittan. SWBT alleges that because it did not receive sufficient information (namely, plans outlining a specific framework designed to reduce end user customer complaints) from Billing Concepts in a timely manner, SWBT suspended its acceptance of billing from Billing Concepts for all Brittan-generated charges.

On or about November 24, 1998, Billing Concepts informed SWBT that Brittan should be reinstated on

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[3] "Cramming" is charging an end user customer for services that were not ordered, authorized or used. "Slamming" is switching an end user's long-distance provider without the end user's consent.

Southwestern Bell's billing tables.[4] On November 30, 1998, SWBT responded to Billing Concepts, informing them that Brittan would be placed on the billing table by December 24, 1998. On December 15, 1998, Southwestern Bell resumed billing for Brittan-generated charges submitted by Billing Concepts. The money collected from those bills was distributed in the normal course of business.

II.

SWBT seeks judgment on the pleadings under Fed. R. Civ. P. 12(c) with respect to Brittan's claims brought pursuant to the Communications Act and the Telecommunications Act of 1996.

A. Legal Standard for Judgment on the Pleadings

In reviewing a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court must base its decision solely on the pleadings. *See Youngblood v. Bender*, 104 F. Supp. 2d 618, 619 (E.D. La. 2000). Such a motion may be granted only if the moving party clearly establishes that no issue of material fact remains to be resolved and that it is entitled to judgment as a matter of law. *See J.M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77, 78 (5th Cir. 1962); *Halkias v. General Dynamics Corp.*, 825 F. Supp. 123, 124 (N.D. Tex. 1993), vacated on other grounds 56 F.3d 27 (5th Cir. 1995). In reviewing a motion for judgment

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[4] SWBT and Billing Concepts had previously agreed that the decision to reinstate Brittan belonged to Billing Concepts, not SWBT.

on the pleadings, a district court must view the facts presented in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party. See *Youngblood*, 104 F. Supp. 2d at 619; *Park Center, Inc. v. Champion International Corp.*, 804 F. Supp. 294, 301 (S.D. Ala. 1992); *See also* 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1368 (2d ed. 2001). By reviewing a Rule 12(c) motion in this manner, courts insure that the rights of the non-moving party are decided as if there had been a trial. *See Eristavi-Tchitcherine v. Lasser,* 164 F.2d 144, 145 (5th Cir. 1947).

B. Brittan's Communications Act Claims

The Communications Act, 47 U.S.C. §§ 151-613, authorizes the Federal Communications Commission ("FCC") to regulate interstate and foreign telephone and radio communication. *See* 47 U.S.C. §§ 151, 152(a). Under Title II of the Communications Act, 47 U.S.C. §§ 201-224, the FCC is given explicit authority to regulate particular aspects of "communication service" by interstate and international communications common carriers. *See, e.g.*, 47 U.S.C. §201(a) (granting the FCC authority to regulate rates charged for communication service by common carriers). Section 202(a) of Title II provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give

> any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a). By its express terms, § 202(a) only applies to situations "for or in connection with" common carrier communication services.

Brittan alleges that SWBT's temporary suspension of billing and collection services for Brittan-generated charges submitted by Billing Concepts violated § 202(a). SWBT maintains, however, that billing and collection services are not "common carrier communication services," and thus, not subject to regulation under Title II of the Communications Act. After careful consideration of applicable FCC opinions and the relevant case law, the Court concludes that SWBT's position is correct.

In 1986, the FCC issued a decision, *In the Matter of Detariffing of Billing & Collection Services*, 102 F.C.C.2d 1150 (1986), which resulted in the detariffing of billing and collection services under Title II. *See id.* 102 F.C.C.2d at 1168. In that decision, the FCC concluded that billing and collection services performed for a long-distance company were not a "communication service," but were instead a "financial and administrative service." *Id.* As such, the FCC would not regulate billing and collection services provided by local exchange carriers under Title II of the Act. *See id.* 102 F.C.C.2d at 1169; *see also Pub. Serv. Comm. of Md. v. FCC*, 285 U.S. App. D.C. 329, 909 F.2d 1510, 1512 (D.C.

Cir. 1990) ("The FCC acknowledged that it could no longer exercise jurisdiction over billing and collection services on the basis of Title II of the Act because...these services were not 'common carrier services'"); *Int'l Audiotext Network v. AT&T*, 893 F. Supp. 1207, 1223 (S.D.N.Y. 1994) (noting that billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Communications Act). Although the FCC relaxed its position somewhat in a subsequent decision, stating that "upon further analysis, we believe that...billing and collection is incidental to the transmission of wire communication and thus is properly considered a communications service under Section 3(a) of the Act...," the FCC did not alter its view with respect to Title II claims, reiterating that "billing and collection, of course, remains outside the scope of Title II because it is not a common carrier service." *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528 n. 50 (1992).

In sum, the relevant principle that can be extracted from these FCC decisions is that billing and collection services that do not utilize communications over the common carrier's wire or radio facilities are not "communications services" regulated by Title II of the Communications Act. *See Int'l Audiotext Network*, 893 F. Supp. at 1224. Thus, Brittan has not alleged a cognizable § 202(a) claim.[5]

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[5] In its Response to SWBT's Motion, Brittan argues that because the FCC has found other "analogous" services (e.g., the provision of billing name and address information, access to paging carriers, access to non-carrier directory assistance services) subject to regulation under Title II of the Communications Act, the FCC has

Accordingly, SWBT's Motion for Judgment on the Pleadings is **GRANTED** with respect to Brittan's claims under § 202(a) of the Communications Act.

C. Brittan's 1996 Telecommunications Act Claims

Next, Brittan alleges that SWBT violated § 251(b)(1) of the Telecommunications Act of 1996 ("the 1996 Act"), 47 U.S.C. §§ 251-53, by "imposing unreasonable or discriminatory conditions or limitations on the resale of telecommunications services." This allegation fails to support a valid cause of action, however, because the subject matter of this dispute, billing and collection services provided by a local exchange carrier, are not within the scope of the Telecommunications Act.

Congress enacted the 1996 Act to foster competition in the local telephone service market and advance the pursuit of universal telecommunications service in the United States. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 614, 625 (5th Cir. 2000). Under the Act, local exchange carriers are subject to a host of duties intended to facilitate market entry, foremost among which is local exchange carrier's duty to share its network with competitors. *See*

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retreated from its earlier position regarding billing and collection services. Although an examination of this evidence would possibly become relevant if the FCC had not spoken to the precise service at issue, such considerations are unnecessary here. Put another way, Brittan has failed to cite a single opinion that reverses the FCC's clear pronouncement that billing and collection services are outside the scope of Title II. Thus, Brittan's lengthy discussion of inapposite FCC decisions is irrelevant to the instant action.

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Section 251(b)(1), applicable to incumbent local exchange carriers, imposes "the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of telecommunications services." 47 U.S.C. § 251(b)(1).

Brittan fails to allege a viable § 251(b)(1) cause of action, however, because Brittan, as a switchless reseller of long-distance service (as opposed to a carrier seeking entry to the local telephone service market), never attempted to purchase telecommunications services from SWBT. This lawsuit revolves instead around the provision of billing and collection services by an incumbent local exchange carrier--not the resale of telecommunications services by an incumbent local exchange carrier.[6] Therefore, § 251 is wholly inapplicable to the facts of this case.[7] Accordingly, SWBT's Motion for Judgment on the Pleadings is **GRANTED** with respect to Brittan's Telecommunications Act claims.

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[6] The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." 47 U.S.C. § 153(43). Clearly, the billing and collection services at issue here do not fall within this definition.

[7] Furthermore, Brittan abandoned its § 251 claim when it failed to adduce evidence on the issue in response to SWBT's Motion for Judgment on the Pleadings. *See Dupre v. Harris Co. Hosp. Dist.*, 8 F. Supp. 2d 908, 925 (S.D. Tex. 1998).

III.

Next, SWBT seeks Summary Judgment on Brittan's DTPA, fraud, tortious interference with contractual relations and tortious interference with business relations claims.

A. Legal Standard for Summary Judgment

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. at 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. at 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Dixon v. State Farm Fire & Cas. Co.*, 799 F. Supp. 691 (S.D. Tex. 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing

evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513.

B. Brittan's Fraud Claims

To prevail on its fraud claim, Brittan must prove that: (1) SWBT made a material representation that was false; (2) it knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) it intended to induce Brittan to act upon the representation; and (4) Brittan actually and justifiably relied upon the representation and thereby suffered injury. *See Union Pacific Res. Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001) (citing *Formosa Plastics Corp. v. Presidio Engineers and Contractors*, 960 S.W.2d 41, 47 (Tex. 1998)); *Ernst & Young v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

Brittan advances two theories in support of its fraud claim. First, Brittan contends that it suffered harm because Billing Concepts, "likely in reliance" on SWBT's alleged representation in a November 2, 1998 letter stating that it might not suspend acceptance of Brittan's billing, did not convey to Brittan the totality of what the letter expressly stated--that SWBT would suspend acceptance of Brittan's billing absent a sufficient and timely response from Billing Concepts. According to Brittan, SWBT intended to remove Brittan from its billing tables no matter what response it received from Billing Concepts. Thus, because SWBT allegedly concealed its true intent from Billing Concepts, Brittan continued to operate in the normal course of business,

unaware that its billing was going to be terminated, and as a result, incurred large financial losses.

In essence, Brittan claims that because it was uninformed about the entire contents of the letter from SWBT to Billing Concepts, Brittan continued to operate and incur costs. This fraud theory is fatally flawed, however, because it is grounded on an alleged misrepresentation of which Brittan claims it was never aware. Even if SWBT misrepresented its intent to consider Brittan's response regarding the potential suspension of Brittan's billing, Brittan specifically states that the alleged misrepresentation was made to Billing Concepts, not Brittan itself. Therefore, based upon its own admissions, Brittan did not rely upon this alleged misrepresentation. *See Ernst & Young*, 51 S.W.3d at 577 (explaining that a fraud claim requires the plaintiff to prove that he actually and *justifiably* relied upon the representation).

Next, Brittan argues that it was harmed when SWBT misrepresented the time it would take to re-establish billing services for Brittan. Specifically, Brittan claims that Dick Oxler, on behalf of SWBT, indicated during a November 1998 conference call between Brittan, SWBT and Billing Concepts personnel that billing services would "promptly be restored" as soon as Billing Concepts made the decision to forward Brittan's billing. Brittan maintains that it relied on this alleged statement in making business decisions, maintaining overhead, and most of all, allowing its customers to continue to use long-distance service at its expense. According to Brittan, the twenty-one days that elapsed before SWBT restored Brittan to its billing tables after receiving the go-ahead from Billing Concepts are evidence that SWBT did not act "promptly."

This fraud theory also fails to support a valid cause of action. In his deposition, Jim Edwards, president of Brittan, stated that at the end of the conference call, the decision as to whether Billing Concepts would ever resume submitting Brittan-generated charges to SWBT was left entirely up to Billing Concepts. Therefore, a real possibility existed that Billing Concepts would never resume its submission of Brittan-generated charges to SWBT for billing and collection. Because Brittan was aware that Billing Concepts may not have ever agreed to resume its submission of Brittan's charges to SWBT, Brittan cannot prove that it *justifiably* acted upon the alleged misstatement by SWBT. *See id.*

In sum, the summary judgment evidence clearly supports a finding that both theories advanced by Brittan in support of its fraud claim fail, as a matter of law, to support a valid cause of action for fraud under Texas law. Accordingly, SWBT's Motion for Summary Judgment is **GRANTED** with respect to Brittan's fraud claim.

C. Brittan's DTPA Claims

SWBT seeks Judgment on the Pleadings, or, in the alternative, Summary Judgment, with respect to Brittan's DTPA claims. In addition to the pleadings submitted by both parties, the Court examined evidence submitted by both parties, i.e., deposition testimony and affidavits, while considering Brittan's allegations brought under the DTPA. As such, the Court will treat SWBT's Motion as a Motion for Summary Judgment, rather than a Motion for Judgment on the Pleadings, as to Brittan's DTPA claims.

The DTPA prohibits "false, misleading or deceptive acts or practices in the conduct of any trade or commerce..." Tex. Bus. & Com.Code § 17.46(a). To recover from SWBT under the DTPA, Brittan must establish: (1) it was a consumer of SWBT's goods or sevices; (2) SWBT committed false, misleading or deceptive acts in connection with the lease or sale of goods or services; and (3) such acts were a producing cause of actual damages to Brittan. *See Brown v. Bank of Galveston, N.A.*, 963 S.W.2d 511, 513 (Tex. 1998).

Brittan alleges that SWBT violated two DTPA laundry list provisions, Tex.Bus. & Com.Code §§ 17.46(b)(5) and (7), by: (1) representing that its goods or services had sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they did not have; and (2) representing that its goods or services were a particular standard, quality or grade, or that goods were a particular style or model, when they were another. Furthermore, Brittan alleges that SWBT violated § 17.45(5)of the DTPA by acting unconscionably in suspending Brittan's billing services. Specifically, Brittan contends SWBT took advantage of Brittan's lack of ability to bill its customers in any economically efficient way without SWBT's service.

The Texas Supreme Court has found that a defendant's deceptive trade act or practice is not actionable under the DTPA unless it was committed in connection with the plaintiff's transaction in goods and services. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 650 (Tex. 1996). The "in-connection-with" requirement imposes a limitation of liability consistent with the underlying purposes of the DTPA, i.e., to protect consumers in consumer transactions. *See id.* at 649-50.

The Amstadt case involved DTPA claims by homeowners against manufacturers of, and suppliers of raw material used in the manufacture of, polybutelene plumbing systems. *See id.* at 650. At issue was whether the Texas Legislature intended that upstream suppliers of raw materials and component parts be liable under the DTPA when none of their misrepresentations reached consumers. *See id.* at 647. The court determined that because the upstream manufacturers and suppliers never marketed or promoted their product to the homeowners, any representations made with regard to the product were not made "in connection with" the relevant consumer transactions, i.e., the purchase of homes. *See id.* at 650-52. The court's analysis applies with equal force to allegations based on misrepresentations and unconscionable acts. *See id.* at 652.

In *Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787 (Tex.App.--Houston [14th Dist.] 2000, no pet.), the Houston Court of Appeals applied the reasoning of Amstadt to a case involving DTPA claims by insured parties against an engineering firm that an insurer had hired to investigate hail damage claims. *See id.* at 789. The plaintiffs' claims were based on allegations that the engineering firm engaged in an unconscionable action or course of action and made misrepresentations that violated several DTPA laundry list provisions. *See id.* at 792 n. 5. As in Amstadt, none of the alleged misrepresentations reached the plaintiffs. *See id.* at 792. The engineering firm had contracted with the insurer to investigate certain hail storm damage claims and had submitted its evaluation materials, findings and opinions to the insurer, not to the plaintiffs. *See id.* As such, the court found that the plaintiffs could not satisfy the "in-connection-with" requirement of the DTPA. *Id.*

Although Amstadt and Dagley involved somewhat different factual situations, the underlying analysis of both decisions is pertinent to the facts of this case. As in Amstadt and Dagley, none of SWBT's alleged misrepresentations were communicated to Brittan. Brittan maintains that "all of the evidence of misrepresentations set forth...in connection with Brittan's fraud claim support a claim under the DTPA." The evidence offered in support of Brittan's fraud claim, however, is based upon alleged misrepresentations made during transactions between (1) SWBT and Billing Connections; and (2) SWBT and Brittan's long-distance customers. Put another way, the alleged misrepresentations were not made during a consumer transaction Brittan and SWBT. Therefore, the allegations forming the basis of Brittan's fraud claim fail to satisfy the "in-connection-with" requirement of the DTPA. *See Amstadt*, 919 S.W.2d at 652. Accordingly, SWBT's Motion for Summary Judgment is hereby **GRANTED** with respect to Brittan's DTPA claims brought pursuant to Tex.Bus. & Com.Code §§ 17.46(b)(5), 17.46(b)(7) and 17.45(5).

D. Brittan's Tortious Interference Claims

Texas law protects existing and prospective contracts from interference. *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Centers, Inc.*, 200 F.3d 307, 315 (5th Cir. 2000) (citing *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 665 (Tex. 1990)). To maintain a cause of action for tortious interference with an existing contract, a plaintiff must demonstrate: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of plaintiff's damage; and (4) actual damage or loss. *See Stewart Glass,*

200 F.3d at 315; *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). Even if a plaintiff establishes the elements of this cause of action, the defendant may still prevail upon successfully establishing the affirmative defense of justification. *See Texas Beef*, 921 S.W.2d at 210.

Brittan asserts that SWBT tortiously interfered with Brittan's contractual and business relations. First, Brittan contends that when SWBT suspended its acceptance from Billing Concepts of Brittan-generated charges, SWBT tortiously interfered with the contractual relations between Billing Concepts and Brittan. Next, Brittan alleges that SWBT tortiously interfered with the business relations between Brittan and Brittan's existing long-distance customers. Brittan maintains that SWBT's suspension of billing services for Brittan-generated charges affirmatively misrepresented to Brittan's customers that although they had received long-distance service from Brittan, they owed nothing for that service. Due to this alleged misrepresentation by SWBT, Brittan's customers failed to remit payment to Brittan and consequently, Brittan suffered economic harm. Both of Brittan's tortious interference theories fail, however, because the summary judgment evidence conclusively demonstrates that SWBT was legally justified in suspending its billing for Billing Concepts of charges originating with Brittan.

In *Texas Beef*, the Texas Supreme Court noted that the justification defense is based on either the defendant's exercise of (1) its own legal rights; or (2) a good faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken. *See id.* (citing *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 107 (Tex. 1984), *overruled on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686,

690 (Tex. 1989)). If the trial court finds that, as a matter of law, the defendant had a legal right to interfere with a contract, then the defendant has conclusively established the justification defense. *Texas Beef*, 921 S.W.2d at 210 (citing *Sakowitz*, 669 S.W.2d at 107). The motivation behind the defendant's assertion of that right is irrelevant. *See Texas Beef*, 921 S.W.2d at 210. Generally, justification is established as a matter of law when the acts the plaintiff complains of as tortious are merely the defendant's exercise of its own contractual rights. *Prudential Ins. Co. of Am. v. Fin. Review Serv., Inc.*, 29 S.W.3d 74, 81 (Tex. 2000); *see also ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 431 (Tex. 1997); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 283 (Tex. 1996); *Calvillo v. Gonzalez*, 922 S.W.2d 928, 929 (Tex. 1996).

The *Calvillo* case involved claims brought by an anesthesiologist with staff privileges at a hospital against Calvillo, the chief of the anesthesiology department. *See* 922 S.W.2d at 929. The plaintiff alleged that Calvillo had tortiously interfered with plaintiff's business relations with the hospital by refusing to schedule plaintiff for anesthesiology work. *See id.* However, Calvillo's contract with the hospital gave the chief exclusive authority to operate and staff the department. *Id.* The Texas Supreme Court held that Calvillo's exclusive contract with the hospital justified, as a matter of law, Cavillo's interference with the plaintiff's prospective business relations, adding that "good faith is not a relevant factor in determining justification if the defendant acts to assert a legal right." *Id.*

Under the reasoning of *Calvillo*, SWBT's contract with Billing Concepts legally justified its interference with the

business relations between Brittan and Brittan's long-distance customers, as well as its interference with the contractual relations between Brittan and Billing Concepts. First, the contract between SWBT and Billing Concepts was filed with and approved by the Public Utility Commission of Texas. As such, the contract had the force and effect of law. *See Kanuco Tech. Corp. v. Worldcom Network Serv., Inc.*, 979 S.W.2d 368, 371 (Tex.App.--Houston[14th Dist.] 1998, no pet.). Knowledge of its terms was imputed to all. *See id.* Secondly, it is undisputed that, at the time of the suspension in November 1998, SWBT was receiving a high volume of nuisance calls from customers. After a customer survey indicated that a large percentage of those calls were in reference to Brittan-generated charges, SWBT decided to protect its customers from additional cramming and slamming by suspending its billing services for charges originated by Brittan. This decision was fully in accordance with the contract between SWBT and Billing Concepts, the relevant provision of which reads: "Billing which will not be processed under the terms of this Agreement includes...charges for services which, in SWBT's sole opinion, may result in nuisance calls to SWBT."

Clearly, the express terms of the SWBT-Billing Concepts contract granted SWBT complete authority to suspend billing and collection for the suspect charges generated by Brittan.[8] Therefore, this Court finds that

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[8] Brittan contends that SWBT breached the SWBT-Billing Concepts contract by not giving Billing Concepts ten days notice before suspending acceptance of Brittan's bills. However, upon inspection of the contract's express terms, it is clear that the notice provision that Brittan refers to unambiguously applies only if SWBT or

SWBT's contract with Billing Concepts establishes, as a matter of law, SWBT's affirmative defense of legal justification. Accordingly, SWBT's Motion for Summary Judgment is **GRANTED** with respect to Brittan's claims of tortious interference with contractual relations.

IT IS SO ORDERED

DONE this 9th day of November, 2001, at Galveston, Texas.

/s/_____
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

Billing Concepts chooses to terminate the entire contract. The contract simply does not include any notice restriction on SWBT's right to stop billing for services that SWBT believes may result in nuisance calls.

FINAL JUDGMENT

For the reasons set forth in the Order issued this date, Defendant's Motion for Judgment on the Pleadings is hereby **GRANTED** and Defendant's Motion for Summary Judgment is hereby **GRANTED**. Accordingly, Plaintiff's claims against Defendant are hereby **DISMISSED WITH PREJUDICE**. All parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED

DONE this 9th day of November 2001, at Galveston, Texas.

/s/_____
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

APPENDIX C

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USCS § 1331 (1993)

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX D

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

47 USCS § 153 (2001)

§ 153. Definitions

For the purposes of this Act, unless the context otherwise requires–

(1) Affiliate.

The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

(2) Amateur station.

The term "amateur station" means a radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest.

(3) AT&T Consent Decree.

The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(4) Bell operating company.

The term "Bell operating company"--

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service;

but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

(5) Broadcast station.

The term "broadcast station", "broadcasting station", or "radio broadcast station" means a radio station equipped to engage in broadcasting as herein defined.

(6) Broadcasting.

The term "broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(7) Cable service.

The term "cable service" has the meaning given such term in section 602.

(8) Cable system.

The term "cable system" has the meaning given such term in section 602.

(9) Chain broadcasting.

The term "chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

(10) Common carrier.

The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(11) Connecting carrier.

The term "connecting carrier" means a carrier described in clauses (2), (3), or (4) of section 2(b) [*47 USCS § 152*(b)].

(12) Construction permit.

The term "construction permit" or "permit for construction" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

(13) Corporation.

The term "corporation" includes any corporation, joint-stock company, or association.

(14) Customer premises equipment.

The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(15) Dialing parity.

The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

(16) Exchange access.

The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

(17) Foreign communication.

The term "foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

(18) Great Lakes Agreement.

The term "Great Lakes Agreement" means the Agreement for the Promotion of Safety on the Great Lakes by Means of Radio in force and the regulations referred to therein.

(19) Harbor.

The term "harbor" or "port" means any place to which ships may resort for shelter or to load or unload passengers or goods, or to obtain fuel, water, or supplies. This term shall apply to such places whether proclaimed public or not and whether natural or artificial.

(20) Information service.

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(21) InterLATA service.

The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

(22) Interstate communication.

The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the [Philippine Islands and] the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than [the Philippine Islands and] the Canal Zone), or the District of Columbia, (B) from or to the United States to or from [the Philippine Islands or] the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act [*47 USCS § § 201* et seq.] (other than section 223 thereof [*47 USCS § 223*]) include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(23) Land station.

The term "land station" means a station, other than a mobile station, used for radio communication with mobile stations.

(24) Licensee.

The term "licensee" means the holder of a radio station license granted or continued in force under authority of this Act.

(25) Local access and transport area.

The term "local access and transport area" or "LATA" means a contiguous geographic area–

(A) established before the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

(26) Local exchange carrier.

The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) [*47 USCS § 332*(c)], except to the extent that the Commission finds that such service should be included in the definition of such term.

(27) Mobile service.

The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile

service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

(28) Mobile station.

The term "mobile station" means a radio-communication station capable of being moved and which ordinarily does move.

(29) Network element.

The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

(30) Number portability.

The term "number portability" means the ability of users of telecommunications services to retain, at the same

location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(31) Operator.

(A) "Operator" on a ship of the United States means, for the purpose of parts II and III of title III of this Act [*47 USCS § § 351* et seq. and 381 et seq.] a person holding a radio operator's license of the proper class as prescribed and issued by the Commission.

(B) "Operator" on a foreign ship means, for the purpose of part II of title III of this Act [*47 USCS § § 351* et seq.], a person holding a certificate as such of the proper class complying with the provisions of the radio regulations annexed to the International Telecommunication Convention in force, or complying with an agreement or treaty between the United States and the country in which the ship is registered.

(32) Person.

The term "person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(33) Radio communication.

The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of

communications) incidental to such transmission.

(34) Radio officer.

(A) "Radio officer" on a ship of the United States means, for the purpose of part II of title III of this Act [*47 USCS § § 351* et seq.], a person holding at least a first or second class radiotelegraph operator's license as prescribed and issued by the Commission. When such person is employed to operate a radiotelegraph station aboard a ship of the United States, he is also required to be licensed as a "radio officer" in accordance with the Act of May 12, 1948 (*46 USC 229a*-h).

(B) "Radio officer" on a foreign ship means, for the purpose of part II of title III of this Act [*47 USCS § § 351* et seq.], a person holding at least a first or second class radiotelegraph operator's certificate complying with the provisions of the radio regulations annexed to the International Telecommunication Convention in force.

(35) Radio station.

The term "radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

(36) Radiotelegraph auto alarm.

The term "radiotelegraph auto alarm" on a ship of the United States subject to the provisions of part II of title III of this Act [*47 USCS § § 351* et seq.] means an automatic alarm receiving apparatus which responds to the radiotelegraph

alarm signal and has been approved by the Commission. "Radiotelegraph auto alarm" on a foreign ship means an automatic alarm receiving apparatus which responds to the radiotelegraph alarm signal and has been approved by the government of the country in which the ship is registered: Provided, That the United States and the country in which the ship is registered are parties to the same treaty, convention, or agreement prescribing the requirements for such apparatus. Nothing in this Act or in any other provision of law shall be construed to require the recognition of a radiotelegraph auto alarm as complying with part II of title III of this Act [*47 USCS § § 351* et seq.], on a foreign ship subject to such part, where the country in which the ship is registered and the United States are not parties to the same treaty, convention, or agreement prescribing the requirements for such apparatus.

(37) Rural telephone company.

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity–

(A) provides common carrier service to any local exchange carrier study area that does not include either–

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996].

(38) Safety convention.

The term "safety convention" means the International Convention for the Safety of Life at Sea in force and the regulations referred to therein.

(39) Ship.

(A) "Ship" or "vessel" includes every description of watercraft or other artificial contrivance, except aircraft, used or capable of being used as a means of transportation on water, whether or not it is actually afloat.

(B) A ship shall be considered a passenger ship if it carries or is licensed or certificated to carry more than twelve passengers.

(C) A cargo ship means any ship not a passenger ship.

(D) A passenger is any person carried on board a ship or vessel except (1) the officers and crew actually employed to man and operate the ship, (2) persons employed to carry on

the business of the ship, and (3) persons on board a ship when they are carried, either because of the obligation laid upon the master to carry shipwrecked, distressed, or other persons in like or similar situations or by reason of any circumstance over which neither the master, the owner, nor the charterer (if any) has control.

(E) "Nuclear ship" means a ship provided with a nuclear powerplant.

(40) State.

The term "State" includes the District of Columbia and the Territories and possessions.

(41) State commission.

The term "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

(42) Station license.

The term "station license", "radio station license", or "license" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

(43) Telecommunications.

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier.

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [*47 USCS § 226*]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(45) Telecommunications equipment.

The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

(46) Telecommunications service.

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(47) Telephone exchange service.

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service.

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(49) Television service.

(A) Analog television service. The term "analog television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(a) of its regulations (47 C.F.R. 73.682(a)).

(B) Digital television service. The term "digital television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(d) of its regulations (47 C.F.R. 73.682(d)).

(50) Transmission of energy by radio.

The term "transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(51) United States.

The term "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include [the Philippine Islands or] the Canal Zone.

(52) Wire communication.

The term "wire communication or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

APPENDIX E

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

47 USCS § 202 (2001)

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included.

Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty.

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $ 300 for each and every day of the continuance of such offense.

APPENDIX F

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

47 USCS § 251 (2001)

§ 251. Interconnection

(a) General duty of telecommunications carriers.

Each telecommunications carrier has the duty–

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers.

Each local exchange carrier has the following duties:

(1) Resale.

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability.

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity.

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way.

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation.

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers.

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate.

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection.

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network–

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access.

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale.

The duty–

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a

State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes.

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation.

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.

(1) In general.

Within 6 months after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], the

Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards.

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether–

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations.

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that–

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration.

(1) Commission authority and jurisdiction.

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs.

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number.

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless

Communications and Public Safety Act of 1999 [enacted Oct. 26, 1999].

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption.

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule.

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an

implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption.

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996].

(2) Suspensions and modifications for rural carriers.

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification–

(A) is necessary–

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements.

On and after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996] under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed

by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier.

(1) Definition.

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that–

(A) on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents.

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes

of this section if–

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision.

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

(2)

Supreme Court, U.S.
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No. 02-1376

In The

Supreme Court of the United States

BRITTAN COMMUNICATIONS INTERNATIONAL CORPORATION,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit err when it affirmed judgment on the pleadings and held that Section 202 of the Communications Act does not apply to third party billing and collection services, in accordance with the FCC's consistent position on the matter?

PARTIES TO THE PROCEEDING

Respondent Southwestern Bell Telephone Company ("SWBT") has been converted into a Texas limited partnership under the name Southwestern Bell Telephone, L.P. Southwestern Bell Holdings, Inc., a Delaware domestic corporation owns a 99% interest in Southwestern Bell Telephone, L.P. For purposes of this proceeding, we will continue to refer to Respondent as "SWBT." Brittan mistakenly claims that SWBT "is now SBC." (Pet. at ii.) In fact, SWBT is an entirely separate entity from SBC Communications Inc.

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BRIEF IN OPPOSITION

SWBT requests that the Court deny the petition for writ of certiorari in this case. The Fifth Circuit opinion presents no conflict or ruling that would warrant the Court's review.

STATEMENT OF THE CASE

This dispute is not about billing; it is about cramming and SWBT's attempts to protect its end user customers. It was Brittan's bad acts, not SWBT, that eventually drove it out of the long distance resale business. Brittan has never had, nor sought, a billing and collections contract with SWBT. Brittan chose not to enter into a billing and collections contract with SWBT and elected, instead, to submit its charges to a billing aggregator, Billing Concepts, with whom Brittan had a contract. *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 902 (5th Cir. 2002). Billing Concepts, in turn, aggregated Brittan's charges with those of other long distance providers and submitted them to SWBT for billing. Under the terms of SWBT's billing and collections contract with Billing Concepts, there are no third party beneficiaries and SWBT retained the right to refuse to bill any charges submitted by Billing Concepts which, in the sole opinion of SWBT, might result in complaints to SWBT's business offices. *Id.* at 903. Billing Concepts was never made a party to this suit by Brittan.

Beginning in late 1997 and mounting throughout the first three quarters of 1998, the FCC, various state public utility commissions, and several state attorneys general undertook a variety of independent investigations into end

user complaints, lodged with such authorities, that Brittan was engaged in cramming and/or slamming. (R. at 302-17; 298B-300; 291B; 280B-89.) SWBT also received a large number of end user complaints about Brittan. In response, and after an opportunity to explain or take corrective action was provided, SWBT exercised its contractual rights and notified Billing Concepts that it was suspending its acceptance from Billing Concepts of billing generated by Brittan, until such time as its end user complaint problem was addressed. After Brittan promised Billing Concepts that it would make changes to reduce cramming complaints, and Billing Concepts both agreed to be responsible for Brittan and requested that billing be resumed, SWBT reinstated billing for Billing Concepts of Brittan-generated charges. (R. at 441.)

On December 16, 2002, the Fifth Circuit affirmed judgment in favor of SWBT on Brittan's Section 202 claim, as well as Brittan's claims of fraud and deceptive trade practices. *Brittan Communications*, 313 F.3d at 899.

In its petition, Brittan only challenges the Fifth Circuit's ruling on its Section 202 claim.

SUMMARY OF THE ARGUMENT

Brittan's reasons for review are not "compelling" as required by Sup. Ct. R. 10. The issue of law at the crux of Brittan's arguments – whether the Fifth Circuit properly adopted the FCC's position regarding the scope of Section 202 of the Communications Act – does not satisfy any of the compelling considerations that support review. The Fifth Circuit's holding does not conflict with the decision of another court of appeals on the same matter or any court

of record; and it has not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). It also does not rise to the level of "an important question of federal law that has not been, but should be, settled by this Court" and certainly does not conflict in any way with any prior decision of the Court. Sup. Ct. R. 10(c).

Indeed, the Fifth Circuit's ruling is consistent with other courts' decisions regarding the scope of Section 202. The Fifth Circuit's holding is also consistent with the FCC's unswerving position since 1986, which is a reasonable interpretation of the statute.

STATEMENT OF FACTS

A. The Parties.

Petitioner Brittan was a small, switchless reseller of long distance telephone service. (R. at 107.) According to the most recent data available, there are 5,679 interstate service providers, which include toll resellers like Brittan, as well as facilities-based carriers. *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, MD Docket No. 03-83, FCC 03-64, 2003 WL 1525987 at Attachment A, ¶ 9 (F.C.C. March 26, 2003). Brittan had no telecommunications facilities of its own, but rather leased long distance access from two existing long distance carriers and resold this access to end user customers in 42 states. (R. at 107 & n.1.) SWBT provides local exchange services and is only licensed to provide local exchange services in five states. SWBT does not provide interstate or foreign communications for hire and is not even the

only local exchange carrier in those five states. (R. at 106-7.) Some of Brittan's long distance customers were also local telephone or "local exchange" customers of SWBT in the five states in which it is licensed to provide local exchange service. It is only with regard to the bill for existing SWBT local exchange customers that SWBT can add the charges of unrelated long distance and information service providers.

Although Brittan could have entered into a billing and collection services contract with SWBT, Brittan made a business decision not to do so. Brittan chose instead to contract with a billing aggregator, Billing Concepts, for the provision of billing and collection services. (R. at 106; 420-21; 376B[1].) Billing Concepts is not and never has been a party to this action. Billing Concepts has billing and collection contracts with various entities, including one with SWBT. (R. at 377B.)

Under the terms of its billing contract with SWBT, Billing Concepts aggregated Brittan's charges with those of many other service providers and forwarded them to SWBT for collection. SWBT had the contractual right to suspend, at any time and even without notice, the billing of any of those charges which, "in SWBT's sole opinion, may result in nuisance calls to SWBT." (R. at 451-451B; 452-453B.) SWBT placed the charges received from Billing Concepts on the telephone bills of SWBT's end user customers, collected the payments due, and forwarded those

[1] In certain instances, the record was not numbered consecutively or in the same order that the documents were filed, and some of the record cites are from the backside of a copied page. Cites to the reverse side of numbered pages in the record are noted herein as "R. at __B."

payments back to Billing Concepts. (R. at 106.) Billing Concepts performed these billing aggregating services for over 400 sub-CICs (customers of billing aggregators) in 1998. (R. at 421.)

B. Brittan's problems with authorities and regulatory agencies.

In 1997 and 1998, a multitude of federal and state authorities and regulatory agencies became concerned about Brittan's marketing practices as a result of consumer complaints. (R. at 302-17; 298B-300; 291B-296; 280B-89.) A number of these entities fined Brittan, imposed restrictions on its operations, and/or completely barred Brittan from doing business in their jurisdictions:

- In April 1997, the California Public Utilities Commission investigated allegations that Brittan switched end user customers' long distance carriers without authority. After several hearings, Brittan was ordered to pay $702,480 in restitution to at least 35,007 customers and agreed that it would not operate in California for at least two years. (R. at 302-17.)

- On October 22, 1997, Brittan entered into an Assurance of Voluntary Compliance with the Texas Attorney General and agreed to change its sweepstakes forms to clarify that a person could enter the sweepstakes without changing his or her long distance services to Brittan. (R. at 298B-300.) Brittan also paid a fine of $65,000. (*Id.*)

- On January 5, 1998, Brittan entered into an Agreed Order with the State of Arizona

concerning its sweepstakes forms and agreed to make marketing changes, including changes to assure that its promotions and advertisements contained information in both English and Spanish, and wording its promotions to clearly and conspicuously state that consumers did not have to change their long distance service to win. Brittan also agreed to pay a $95,000 fine. (R. at 291B-296.)

- On October 29, 1998, the FCC initiated an enforcement action against Brittan, and issued a Notice of Apparent Liability, outlining its proposed fine against Brittan in the amount of $1,120,000. The FCC explained that the size of the fine was based on the egregious nature of the facts, namely that the FCC determined that, as to end user customers who lodged a formal complaint with the FCC, at least twelve of the Brittan Letters of Authority ("LOAs") were forged. (R. at 280B-289.) Ultimately, the FCC fined Brittan one million dollars. (R. at 440.)

Additionally, Brittan was in trouble with authorities in a number of states, including Mississippi, Florida, Michigan, and Georgia for slamming and/or cramming. (R. at 378B-79B; 272-76; 269.)

C. Brittan's problems with other local exchange carriers.

SWBT was not the only local exchange carrier to voice concerns to Billing Concepts about the charges and end user complaints generated by Brittan. In May 1998, Bell Atlantic advised Billing Concepts that it had suspended billing for Billing Concepts of Brittan-generated charges

due to excessive end user complaints. (R. at 245-47; 419.) Bell Atlantic only resumed billing of these charges after Billing Concepts assured Bell Atlantic that Brittan had agreed to cease billing monthly recurring charges for those months when end users had no charges accompanied by associated toll. (R. at 419.)

In September 1998, Ameritech, another local exchange carrier (unaffiliated with SWBT at that time), complained to Billing Concepts about the high level of complaints associated with Brittan-generated charges. (R. at 243.) Ameritech advised Billing Concepts that the complaint levels for its August billing of Brittan-generated charges exceeded Ameritech's thresholds and that if Ameritech received two more batches of complaints against Brittan, under Ameritech's "three strikes and you're out" policy, Ameritech would suspend its billing and collection for Brittan-generated charges from Billing Concepts. The billing of such charges continued to result in high levels of end user complaints, and by early October of 1998, Billing Concepts and Brittan knew that suspension of billing these charges for Billing Concepts by Ameritech was imminent. (R. at 383B-84B.)

D. SWBT and Ameritech independently and temporarily suspend billing for Billing Concepts of Brittan-generated charges.

In the fall of 1998, SWBT took random samples, of fifty to one hundred complaints, for each of those billing and collection customers whose billing was generating the highest numbers of complaints. SWBT received approximately 2400 end user complaints associated with charges that Billing Concepts had tendered to SWBT for billing. (R. at 233-36.) In late October, SWBT pulled a random

sample of one hundred of the twenty-four hundred complaints from September 1998 involving charges submitted by Billing Concepts for billing. (R. at 227; 229.) Thirty-four of the one hundred complaints sampled, more than those lodged against any other single sub-CIC of Billing Concepts, were against Brittan. (*Id.*) The survey showed that none of the end users who complained had selected Brittan as their long distance carrier, and in many cases, these end users claimed they did not even know who Brittan was. (R. at 227; 622 ("never ordered," "did not authorize," "claims no knowledge").) Two other sub-CICs of Billing Concepts, Quintelco and Telco Partners, had thirty-two and eighteen of these one hundred sampled complaints respectively. Because prior warnings had been issued concerning complaints associated with these sub-CICs, SWBT immediately suspended its acceptance from Billing Concepts of charges generated by Quintelco and Telco Partners. (R. at 227.)

In response to the survey, SWBT informed Billing Concepts of SWBT's intention to suspend also its acceptance from Billing Concepts of any Brittan-generated charges unless Billing Concepts could provide SWBT within five days of "any reasons you may find which would keep us from taking the same action [as SWBT had taken already with regard to charges generated by Quintelco and Telco Partners]." (R. at 227.) In response, Brittan sent Billing Concepts a letter, which merely blamed the two long distance carriers whose services Brittan was reselling, for the specific complaints in the sample. The letter did not provide any assurances that the problems had been resolved or that further complaints would not be lodged if billing continued. (R. at 224-25B.)

SWBT therefore informed Billing Concepts that SWBT would suspend its acceptance of billing from Billing Concepts of Brittan-generated charges, unless and until Billing Concepts provided SWBT with a specific action plan designed to reduce complaints. (*Id.*) Shortly thereafter, SWBT determined it would place the decision, whether the suspension should be lifted, in the hands of Billing Concepts, and so advised Billing Concepts. (R. 392.)

In a telephone conference call on November 16, 1998, SWBT reminded both the Billing Concepts and Brittan participants that SWBT had previously announced that it had turned the decision, whether to reinstate billing of Brittan-generated charges, over to Billing Concepts. The Billing Concepts representatives on the call acknowledged this fact, informed the parties that it was a decision for Jackie Mitchell, the president of Billing Concepts, to make, and advised the participants that Ms. Mitchell was out of town. (R. at 389, 392; 409-10; 413-14; 763.)

Brittan later committed to Billing Concepts that it would make various changes to reduce complaints. (R. at 409-10; 175-214.) In response, Billing Concepts informed SWBT that Brittan should be reinstated on SWBT's billing tables. (R. at 172.) Thereafter, in the course of business, SWBT resumed billing for Billing Concepts of Brittan-generated charges, SWBT processed all of the Brittan-generated billing tendered by Billing Concepts, and the money collected was paid to Billing Concepts. (R. at 441, 445.)

ARGUMENT

A. The Fifth Circuit's Well-Reasoned Opinion is Based On the FCC's Consistent Position On Billing and Collection Services.

The FCC has spoken on the scope of Section 202, and it has consistently determined that Section 202 does not apply to billing and collection services that Local Exchange Carriers ("LECs") provide to other parties. According to the FCC, such billing and collections services do not satisfy the two requirements for activity to be regulated by Title II.[2] To determine whether certain activity is covered by Section 202 or not, the FCC inquires into two basic areas: (1) whether the activity in question constitutes "wire communication" within the meaning of Section 3(a) of the Communications Act, 47 U.S.C. § 153(a); and (2) whether the activity is provided on a carrier basis within the meaning of Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). *In the Matter of Detariffing of Billing & Collection Services*, 102 F.C.C.2d 1150 (1986); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 8 F.C.C.R. 4478 ¶ 12 (1993); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (reviewing the two-part test for deciding whether a carrier is engaged in common carriage and remanding for FCC to determine whether petitioners had offered dark fiber service on a common carrier basis).

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[2] Neither the district court nor the Fifth Circuit had to reach the merits of the discrimination claim, but they both could have rendered summary judgment on Brittan's Section 202 claim in any event because there is absolutely no evidence of disparate treatment. (R. 480-84.)

An entity may be considered a common carrier for some practices, and a private carrier for others. *Southwestern Tel. Co.*, 19 F.3d at 1480-81; *In the Matter of Audio Communications, Inc. Pet. for a Declaratory Ruling that the 900 Serv. Guidelines of US Sprint Communications Co. Violate Sections 201(A) & 202(A) of the Communications Act*, 8 F.C.C.R. 8697, ¶¶ 12-22 (1993). If the carrier chooses its clients on an individual basis and "there is no specific regulatory compulsion to serve all indifferently," the entity is a private carrier for that type of service, and the FCC may not subject the entity to regulation as a common carrier. *Southwestern Bell Tel. Co.*, 19 F.3d at 1481. SWBT provided its billing and collection services on an individual basis. There is absolutely no evidence, and certainly no support in the record, for Brittan's claim that SWBT's provision of billing and collection services were offered as "common carrier services" within the special meaning attributed to that phrase by the Communications Act.

As the Fifth Circuit correctly recognized, the FCC has never altered its view that billing and collection services provided by LECs to unaffiliated long-distance providers is outside the scope of Title II, 47 U.S.C. §§ 201-224. *Brittan Communications*, 313 F.3d at 905-06, *citing In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 24,744, ¶ 70 & n.87 (1998).[3] Brittan claims that the FCC has been inconsistent and/or arbitrary. The Fifth Circuit correctly concluded, however, that the FCC's position is, and has been, consistent and reasonable.

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[3] In contrast, a carrier's own billing and collection services for itself may be considered common carrier services under Title II. *Id.*

1. The FCC's consistent position has excluded billing and collection services from regulation under Title II.

The FCC has never retreated from its consistent position that billing and collection services provided by LECs to long distance providers is outside the scope of Title II. In 1986, the FCC first addressed this issue head on and concluded that billing and collection services for another entity are not subject to Title II. *In the Matter of Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, ¶¶ 30-33 (1986). Three years later, the FCC determined that it had preemptive jurisdiction over billing and collection services, and its preemptive jurisdiction precluded state agencies from imposing regulations on the rates for such services. The FCC then reiterated that billing and collection services are not subject to Title II regulation. *In the Matter of the Pub. Serv. Comm'n of Maryland and Maryland People's Counsel Application for Review of a Memorandum Opinion and Order By the Chief*, 4 F.C.C.R. 4000, ¶¶ 40-43 at n.76 (1989).

In 1992, the FCC considered the regulation of validation and screening services, which are separate and distinct from billing and collection services, and concluded that "[b]illing and collection of course, remains outside the scope of Title II because it is not a common carrier service." *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 F.C.C.R. 3528, ¶ 26 & n.50 (1992).

Similarly, in 1993, the FCC required LECs to provide billing names and addresses ("BNA") under certain circumstances, but still noted specifically that "[i]n concluding that the provision of BNA is now properly subject to

Title II regulation, we emphasize that we do not disturb our prior finding that the provision of interstate billing and collection services by a LEC to an unaffiliated IXC [interexchange carrier] is not a common carrier service under Title II." *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 8 F.C.C.R. 4478, ¶¶ 20, 42 & n.61 (1993)

Five years later, in *In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 24,744, ¶ 70 (1998), the FCC mentioned billing and collection services in their discussion of universal service fund fees. In addressing a carrier's own responsibilities to describe charges on its own bills accurately, the FCC stated that "a carrier's billing and collection practices for communications services are subject to regulation as common carrier services under Title II of the Act." *Id.* This statement was clearly limited and referred only to a carriers' own description of charges on its own bills, not billing by LECs for other parties. At that time, the FCC was especially concerned with how carriers classified charges on bills for universal fund charges and prohibited the carriers from describing these charges as mandatory or federally-approved. In footnote 87 of its ruling, the FCC specifically noted that carrier remains liable for truthful billing even if billing and collection is done by another entity.

In 1999, the FCC again specifically noted that billing and collection services are excluded from coverage under Title II. *In the Matter of Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, 14 F.C.C.R. 10,861, ¶¶ 59-60 (1999) ("In 1992, the Commission clarified that billing and collection service was a communications service within the meaning of Section 3(a) of the Act,

but that it was not subject to regulation under Title II because it was not a 'common carrier' service.").

Likewise, in *In the Matter of Truth in Billing Format*, 14 F.C.C.R. 7492, ¶ 25 (1999), the FCC considered various protections for consumers, including guidelines of carrier billing. The FCC explicitly confirmed that these consumer protection guidelines applied to the carrier providing service to end users, but not to those carriers' billing agents. *Id.*

In *In the Matter of Teleservices Industry Association v. AT&T*, 15 F.C.C.R. 21,454 (2000), the FCC again explicitly stated that "billing services are not subject to tariff regulation under Title II of the Act and are currently unregulated." *Id.* at ¶ 2 & n.5.

The FCC has never strayed from its position that billing and collection services for a third party are not regulated by Title II. Surprisingly, Brittan failed to mention in its petition that the other courts who have confronted this issue have determined uniformly that billing and collection services are not subject to Title II. The Second Circuit expressly adopted a finding on this same point in *International Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 893 F. Supp. 1207, 1224 (S.D.N.Y. 1994), *aff'd*, 62 F.3d 69 (2d Cir. 1995). Additionally, the District of Columbia Circuit rejected a petition asking for regulation of billing and collection services and found that the FCC's refusal to regulate billing and collection services was neither arbitrary nor capricious. *Capital Network Sys. v. FCC*, 3 F.3d 1526 (D.C. Cir. 1993).

Brittan points to *Golden Belt Telephone Association v. C.I.R.*, 108 T.C. 498 (1997), claiming that it proves that the FCC's position is arbitrary. In *Golden Belt*, the Tax Court

was trying to determine whether the billing services that Golden Belt provided in conjunction with its local and long distance services was separate income that should be taxed or whether it was tax-exempt as an element of the communication services that Golden Belt provided. The Tax Court relied on the FCC's prior statements about whether billing and collection services are communication services to determine the interpretation of a tax statute. The Tax Court quoted from the FCC's 1992 decision from *In the Matter of Policies and Rule Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards* and concluded that these services were communication services, but "[b]illing and collection, of course, remains outside the scope of Title II because it is not a common carrier service." *Id.* at 504.

Brittan simply has no authority to support its contention that billing and collection services by LECs for other entities are subject to regulation under § 202 of the Communications Act.

2. The FCC's position and the Fifth Circuit's ruling are a reasonable interpretation of Section 202.

Brittan claims, without any cite to authority, that LECs provide billing and collection services in their capacity as common carriers. (Pet. at 17.) Even under the plain terms of the statute, this conclusion is obviously flawed. There is absolutely no evidence, and certainly no support in the record, for Brittan's claim that SWBT provides billing and collection services on a "common carrier" basis within the special meaning attributed to that phrase by the Communications Act.

Even a cursory examination of the statutory language defies such a claim. Section 202 prohibits discrimination by "any common carrier . . . for or in connection with like communication service. . . . " It is based on this language that the FCC's analysis involves two basic questions: whether a communications service is involved and whether it is provided on a common carrier basis. The literal language of the statute does not compel the conclusion that it includes billing and collection services because such services are not literally communication services and LECs' billing and collection services certainly do not fit the common understanding of the term "common carrier communication services."

Brittan claims that the FCC has acknowledged that billing and collection services are subject to common carrier requirements. (Pet. at 18.) The FCC has not acknowledged that billing and collection services for third parties, which are not tied to access, are subject to common carrier requirements. In support of this contention, Brittan points to 47 U.S.C. § 272 of the 1996 Telecommunications Act and asserts that it involves common carrier requirements, and that it has been extended to cover billing and collection services. (Pet. at 18.) The nondiscrimination provisions of § 272 specifically encompass a wide variety of services, far more extensive than the "common carrier communications services" addressed in § 202. The fact that the FCC has determined that such services are subject to nondiscrimination does not support Brittan's claim that billing and collection services are subject to the common carrier requirements of Title II. Section 272 does not mention common carrier communications services. Rather, § 272(c)(1) broadly states that a Bell Operating Company:

> may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.

If Brittan's distorted conclusion were correct, § 272 would just be cumulative of the provisions of § 202.[4]

Brittan cites one case purportedly in support of its statutory construction argument, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). This case is inapposite. In *Association of Communications Enterprises*, the Court of Appeals for the District of Columbia concluded that the FCC was unreasonable in its statutory construction of the term "successor or assign." The FCC argued that an advanced services affiliate was not encompassed by the term "successor or assign." Obviously, the terms at issue are not the same in this case, and the FCC's interpretation of other terms in an entirely different context is not helpful to determine whether the FCC's interpretation in this case is appropriate.

If the statute is considered ambiguous, the FCC's interpretation of the statute is entitled to deference as long as it is a reasonable interpretation. *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 502, 122 S.Ct. 1646, 1668 (2002); *National Cable & Telecommunications Association, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333, 122 S.Ct.

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[4] Brittan could not have brought a claim under § 272, however, because until July 2000, SWBT did not have any affiliates who provided InterLATA services. (R. 480.) Therefore, § 272 did not apply in November 1998, when Brittan's billing was suspended. But because § 272 applies now, Brittan's assertion that review is necessary in this case to avoid discrimination (Pet. at 24) misses the mark.

782, 786 (2002). The FCC's interpretation of § 202 is reasonable. It should not be disturbed.

3. Brittan's analogies to other services do not compel any change on the FCC's position with respect to billing and collection services for third parties.

Brittan claims that the FCC has imposed regulations on LECs who provided billing and collection services in connection with their payphone services, and that this requires billing and collection services to be regulated under Title II. The FCC has decided that if LECs provide basic, tariffed payphone services that will only function in conjunction with billing and collection services from LECs, LECs are required to provide billing and collection services, too. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 F.C.C.R. 20,541, ¶ 149 (1996). A requirement to provide billing and collection services under those circumstances is very different from providing billing and collection services to a third party when they are not tied to, or a prerequisite for, accessing the service.

Brittan asks the Court to believe that the FCC meant to regulate billing and collection services by LECs when it imposed certain standards and limitations on how carriers bill and collect for their own interstate offerings. Brittan's arguments on this point are circular, conclusory, and flat-out wrong. As the Fifth Circuit found, the FCC did not proclaim in any way that it would regulate billing and collections by LECs for third parties, even though it made clear that carriers are obligated to provide truthful billing to their customers with regard to the charges they

generate. *In the Matter of Truth in Billing Format*, 14 F.C.C.R. 7492, ¶ 25 (1999).

B. Brittan Has Not Raised Any Issue Worthy of Further Review by this Court.

Brittan has not raised any "compelling" reason for review. Sup. Ct. R. 10. The Fifth Circuit's holding does not conflict with the decision of another court of appeals on the same matter, and in fact, it does not conflict with the decision of any court of record. The Fifth Circuit's decision in this case has not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). It also does not rise to the level of "an important question of federal law that has not been, but should be, settled by this Court," and certainly does not conflict in any way with any prior decision of the Court. Sup. Ct. R. 10(c).

As demonstrated above, the Fifth Circuit simply adopted the FCC's consistent position for the past seventeen years, which has specifically excluded billing and collection services for third parties from Title II. The courts that have addressed this issue have uniformly agreed. There is no need for the Court to review this issue any further.

CONCLUSION

In short, Brittan has not demonstrated at all that the FCC has acted arbitrarily or unreasonably in excluding billing and collection services from Title II regulation. Significantly, there are no conflicts here between or among

the courts or between the courts and the FCC. SWBT respectfully submits that the Fifth Circuit properly decided this case and requests that the Court deny the petition.

Respectfully submitted,

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